No. 96-1590-CFX Title: Federal Election Commission, Petitioner
v.
James E. Akins, Richard Curtiss, Paul Findley, Robert J. Hanks, Andrew Killgore, and Orin Parker

Docketed:
April 8, 1997 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Feb 20 1997	Application (A96-599) to extend the time to file a petition for a writ of certiorari from March 6, 1997 to April 5, 1997, submitted to The Chief Justice.
	Feb 21 1997	Application (A96-599) granted by the Chief Justice extending the time to file until April 7, 1997.
	Apr 7 1997	Petition for writ of certiorari filed. (Response due May 8, 1997)
	Apr 7 1997	Appendix of petitioner filed.
	May 7 1997	Brief of respondents James Akins, et al. in opposition filed.
	May 20 1997	DISTRIBUTED. June 5, 1997
	May 29 1997	Reply brief of petitioner Federal Election Commission filed.
	Jun 9 1997	REDISTRIBUTED. June 12, 1997
	Jun 16 1997	Petition GRANTED. SET FOR ARGUMENT January 14, 1997. **********
	Jul 21 1997	Order extending time to file brief of petitioner on the merits until August 21, 1997.
	Aug 20 1997	Brief amicus curiae of American Israel Public Affairs Committee filed.
	Aug 20 1997	Brief amicus curiae of Brennan Center for Justice filed.
	Aug 21 1997	Joint appendix filed.
	Aug 21 1997	Brief of petitioner Federal Election Commission filed.
	Aug 21 1997	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Aug 21 1997	Brief amicus curiae of National Right to Life Committee, Inc. filed.
	Sep 16 1997	Order extending time to file brief of respondent on the merits until September 29, 1997.
	Sep 29 1997	Brief of respondents James Akins, et al. filed.
	Sep 29 1997	Brief amicus curiae of Common Cause filed.
	Oct 30 1997	Reply brief of petitioner Federal Election Commission filed.
	Nov 24 1997	Record filed.
	Nov 25 1997	CIRCULATED.
	Dec 16 1997	Record filed.
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	Jan 15 1998	Letter from the Solicitor General received and distributed.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an organization that spends more than $1,000 on contributions or coordinated expenditures in a calendar year, but is neither controlled by a candidate nor has as its major purpose the nomination or election of candidates, is a "political committee" within the meaning of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

2. Whether respondents had standing to bring this suit.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No.

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Election Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. 1a-40a) is reported at 101 F.3d 731. The opinion of the court of appeals panel (App. 41a-74a) is reported at 66 F.3d 348. The opinion of the district court (App. 77a-93a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 6, 1996. On February 21, 1997, the

Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 301(4)(A) of the Federal Election Campaign Act of 1971 (FECA or Act) defines the term "political committee" to include

> any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.

2 U.S.C. 431(4)(A).

STATEMENT

1. This case involves provisions of the Federal Election Campaign Act of 1971 (FECA or Act) governing the activities of a "political committee," defined by the Act to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000

during a calendar year." 2 U.S.C. 431(4)(A).[1] The FECA requires political committees to satisfy certain organizational requirements. 2 U.S.C. 432. The Act also requires a political committee to register with the Federal Election Commission (FEC or Commission) and to file periodic reports of all of its receipts and disbursements for disclosure to the public. 2 U.S.C. 433, 434. The FECA provides in addition that no person may make contributions to a political committee which, in the aggregate,

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[1] Section 301(8)(A) of the FECA defines "contribution" to include

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. 431(8)(A).

Section 301(9)(A) of the Act defines the term "expenditure" to include

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. 431(9)(A).

The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or the candidate's agents—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

exceed $5,000 in a calendar year. 2 U.S.C. 441a(a)(1)(C); see *FEC* v. *Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 253-254 (1986) (plurality opinion) (describing requirements applicable to political committees).

Election-related expenditures made by individuals, and by groups that are not "political committees," are subject to extensive disclosure requirements. All "persons" (a term that includes any "organization or group of persons," 2 U.S.C. 431(11)) that make independent election expenditures aggregating more than $250 and are not political committees are required to file disclosure reports with the Commission. 2 U.S.C. 434(c); *MCFL*, 479 U.S. at 252-253 (plurality opinion). In addition, the Act requires that any contributions (including coordinated expenditures) aggregating more than $200 from such persons to candidates or political committees must be reported by the recipient political committees. 2 U.S.C. 434(b)(3). With respect to reporting requirements, the distinctive consequence of "political committee" status is that such an organization is required to make comprehensive disclosures of *all* of its receipts and disbursements, whether or not they bear any direct relation to electoral campaigns.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed a broad array of issues concerning the construction and constitutionality of the Act. The Court observed:

> The general requirement that "political committees" and candidates disclose their expenditures could raise * * * vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. To fulfill

> the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79 (footnotes omitted).

The Court reaffirmed the "major purpose" test for status as a "political committee" in *MCFL*. A plurality noted that "this Court said [in *Buckley*] that an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 479 U.S. at 252 n.6. And the Court observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262.

2. The FEC is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, 437g. Congress has authorized the Commission to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1), 437d(e); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h. Congress has thus "vest[ed] in [the FEC] primary and substantial responsibility for administering and enforcing the Act." *Buckley*, 424 U.S. at 109.

The FECA states that "[a]ny person who believes a violation of this Act * * * has occurred, may file a

complaint with the Commission." 2 U.S.C. 437g(a)(1). The Act further provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. 437g(a)(8)(A). In such a proceeding, the reviewing court

> may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

2 U.S.C. 437g(a)(8)(C).

3. The American Israel Public Affairs Committee (AIPAC) is an incorporated, tax exempt organization with approximately 50,000 supporters and an annual budget of approximately $10 million. Its stated purpose is to maintain and improve friendship and goodwill between the United States and Israel. The organization's activities include lobbying Congress and the Executive Branch for military and economic aid to Israel. App. 2a-3a.

Respondents are former ambassadors, Members of Congress, or other government officials. In 1989 they filed an administrative complaint with the Commission, alleging that AIPAC had violated the FECA. Specifically, respondents alleged that AIPAC's activities brought it within the statutory definition of "political committee," and that

it had failed to comply with the statutory requirements to which political committees are subject. App. 3a-4a.[2]

The FEC's General Counsel investigated the allegations. The General Counsel

> conclude[d] that AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and do[] not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

C.A. App. 189; see App. 43a. The General Counsel therefore recommended that the Commission find no probable cause to believe that AIPAC had violated 2 U.S.C. 433 and 434, the organizational and reporting requirements applicable to political committees. C.A. App. 194, 222. The General Counsel recommended, however, that the Commission find probable cause to believe that AIPAC had violated 2 U.S.C. 441b, which generally prohibits corporations from making campaign contributions and expenditures. C.A. App. 195, 222.

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[2] Respondents

> claimed that AIPAC met the statutory definition of political committee because, for example, it used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meetings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates.

App. 3a-4a.

Consistent with the recommendation of the General Counsel, the Commission unanimously found no probable cause to believe that AIPAC had violated Sections 433 and 434. App. 95a. The Commission found probable cause to believe that AIPAC had violated Section 441b. *Ibid.* The FEC voted, however, to take no action regarding that determination, *ibid.*, explaining that "the Commission should clarify its membership definition before imposing penalties in close cases such as this," App. 98a.[3]

4. Respondents filed suit in federal district court. They challenged the FEC's determination that there was no probable cause to believe that AIPAC was a "political committee" within the meaning of the Act. The district court granted summary judgment for the Commission. The court concluded that "the Commission interpreted properly the statutory definition of 'political committee' and the 'major purpose' test." App. 92a. The court also determined that "the Commission's application of the

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[3] AIPAC contended that the alleged contributions in this case involved communications to AIPAC's own members and were therefore exempt from Section 441b's prohibition on corporate campaign contributions and expenditures. The FECA's definition of "expenditure" generally excludes "any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel." 2 U.S.C. 431(9)(B)(iii); see also 11 C.F.R. 100.8(b)(4), 114.3(a)(2). Consistent with the General Counsel's recommendation, a majority of the Commission concluded that "AIPAC did not meet the Commission's membership criteria," and therefore found probable cause to believe that AIPAC had violated Section 441b. App. 98a. The Commission also concluded, however, that the case "presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this, where the organization came close to meeting the 'spirit' of the Commission's membership criteria, but failed on a specific point." *Ibid.* The Commission therefore "decided to exercise [its] prosecutorial discretion, and to take no further action with respect to the finding on Section 441b." *Ibid.* (citation omitted).

major purpose test to the facts presented * * * regarding AIPAC's campaign-related activities was reasonable." *Ibid.*

5. A divided panel of the court of appeals affirmed. App. 41a-74a. The panel first held that respondents had standing to bring their suit. Relying on circuit precedent, the panel held that respondents' asserted "informational injury"—*i.e.*, respondents' contention that "their ability to influence and inform policymakers and the public is impaired by the lack of information about AIPAC's contributors and expenditures," App. 45a—was sufficient to meet the requirements of Article III. App. 45a-46a. The court also concluded that, "[b]ecause [respondents] allege that they are voters and persons who seek to communicate to policymakers and the public about AIPAC's campaign contributions, their interest in information about campaign contributions falls within the 'zone of interests' intended to be served by the statute." App. 47a.

On the merits, the panel concluded that this Court's decisions in *Buckley* and *MCFL* furnished a reasonable basis for the Commission's application of the "major purpose" test. The panel explained:

> Although *Buckley* and [*MCFL*] concern expenditures under the Act, the Court's rationale concerning the constitutional implications of a broad application of the Act to expenditures applies equally to the Act's reach over contributions. A broader construction of "political committee" would likely require advocacy groups to disclose their contributors even though the group is not principally involved in advancing the election or defeat of a candidate. This could raise a First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). It is our duty in the interpretation of a federal

statute to avoid serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47 (1953).

App. 55a-56a (parallel citations omitted). The panel concluded that, "[b]ecause a judicial gloss on the statute has limited the application of FECA's restrictions for political committees to groups whose major purpose is the nomination or election of a candidate, the FEC's interpretation of the major purpose test was not contrary to law." App. 56a.[4]

Judge Silberman filed an opinion concurring in part and dissenting in part. App. 58a-74a. Relying on respondents' "assert[ion] that they compete with AIPAC in lobbying Congress and seeking to persuade the American people on their views of American interests regarding Arab-Israeli disputes," Judge Silberman viewed the suit as "akin to one brought by an economic competitor" and concluded that respondents satisfied the requirements of Article III. App. 58a-59a. On the merits, Judge Silberman acknowledged that "there is language in *Buckley* and *MCFL* that can literally be read to support the FEC's position." App. 68a. He concluded, however, that the "major purpose" test could not properly be applied to an organization that had made *contributions* (as opposed to independent expenditures) in excess of Section 431(4)(A)'s $1,000 limit. App. 73a. In Judge Silberman's view, any such organization is subject to the statutory requirements applicable to "political committees," whether or not campaign-related activities constitute a major purpose of the organization. *Ibid.*

6. The court of appeals vacated the panel decision and granted rehearing en banc. App. 75a-76a. The en banc court of appeals subsequently reversed the judgment of the district court. App. 1a-40a.

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[4] The panel also upheld, as reasonable, the Commission's determination that campaign-related activities were not a major purpose of AIPAC. App. 57a-58a.

a. The en banc court of appeals first concluded that respondents had standing as voters because "[t]hey have been deprived of certain specific information that Congress thought voters need to make an informed choice and therefore required 'political committees,' *inter alia*, to disclose." App. 8a. The court explained that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time the bids are due, would suffer a particularized injury even if all other bidders also suffered an injury." App. 12a. Because it concluded that respondents "have standing as affected voters," it declined to "resolve whether [respondents] also have standing as political competitors of AIPAC, or whether [respondent] Findley—who was last a candidate in 1982—has standing as a candidate." App. 13a (citation omitted).

The court also rejected the FEC's argument that respondents' claim was not redressable because the Commission possesses enforcement discretion and might decline to compel disclosure by AIPAC. The court explained that "it has always been an acceptable feature of judicial review of agency action that a petitioner's 'injury' is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning." App. 15a. The court of appeals also noted that respondents would be authorized by the FECA to bring suit against AIPAC if the Commission failed to "conform" to the court's "declaration." *Ibid.* (quoting 2 U.S.C. 437g(a)(8)(C)). The court stated that "[i]t would appear under [Section 437g(a)(8)(C)] that if the Commission gave only lip service to compliance with [the court's] order and settled with AIPAC without requiring disclosure, * * *

[respondents] would be able to seek disclosure directly." *Ibid.*

b. On the merits, the en banc court of appeals concluded that AIPAC was a "political committee" within the meaning of the FECA. The court rejected the Commission's argument that the FEC's contrary conclusion was entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court reasoned that the controversy involved the proper construction of this Court's opinions in *Buckley* and *MCFL*, and that deference to the agency therefore was inappropriate. App. 19a-20a.

Addressing the interpretive issue "*de novo*," the court of appeals framed the "key question" as "whether the Supreme Court's major purpose limitation imposed in certain circumstances for constitutional reasons applies in another circumstance—this case—in which the same constitutional concerns may not be implicated." App. 20a. The court acknowledged that "language in *Buckley* and *MCFL* can literally be read to support the FEC's position." App. 21a. The court reasoned, however, that "both cases focused on the constitutional concerns raised by independent expenditures * * * as distinguished from coordinated expenditures or direct contributions." *Ibid.* The court noted that "[i]ndependent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption." *Ibid.*

The court of appeals construed the disputed language in *Buckley* to mean only that, "when an organization controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be expenditures within the statutory definition." App. 24a. It concluded that the

Buckley Court "clearly distinguished independent expenditures and contributions as to their constitutional significance, and its references to a 'major purpose' test seem to implicate only the former." *Ibid.* The court of appeals read the *MCFL* opinion in a similar fashion. App. 24a-25a.

The court of appeals also believed that the Commission's approach would have untoward practical consequences. Thus, the court stated:

> The FEC's interpretation of "political committee" would * * * allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not.

App. 27a. In the court's view, that approach "would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of 'political committee.'" *Ibid.*

The court concluded:

> There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made campaign contributions in excess of $1,000. Its decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of [respondents'] complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the com-

plaint and remand to the FEC for further action not inconsistent with this opinion.

App. 29a.

c. Judge Sentelle, joined by Judge Henderson, dissented. App. 30a-40a. The dissenting judges concluded that respondents asserted only a "generalized grievance"—"a diffuse rather than a particularized injury"—and therefore lacked standing under Article III. App. 32a-33a. They explained that respondents "have no statutory right, through section 437g or any other provision, to force the FEC to collect and turn over this information. In the absence of such a right, no injury—informational or otherwise—is possible." App. 38a. The dissenting judges also concluded that any injury respondents might have suffered was not redressable by a judicial order. They explained that respondents' "claim of redressability depends on the linked chain that the Commission will enter an order against AIPAC requiring the information [respondents] seek, that AIPAC will comply with that order, and that [respondents] will still be sufficiently interested in the information thus produced that they will renew their claim on FEC to present them with that information." App. 40a. In the view of the dissenting judges, that chain of inferences was "too attenuated to provide the sort of redressability necessary to meet Article III standing." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case conflicts with this Court's decisions construing the FECA's definition of "political committee," and it places substantial burdens on organizations engaged primarily in issue advocacy by requiring that they disclose all of their receipts and disbursements. Because the Commission's dismissal of a complaint is reviewable only in the D.C. Circuit, the FEC will be effectively precluded from advancing its construc-

tion of the Act in any other court of appeals. The court of appeals has also adopted an unduly broad view of standing under the special judicial review provision invoked by respondents. Review by this Court is therefore warranted.

1. a. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed a wide range of issues concerning the interpretation and constitutionality of the FECA. In discussing the financial disclosure requirements imposed by the FECA, the Court observed:

> To fulfill the purposes of the Act [the term "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79. *Buckley* involved this Court's resolution of a broad array of certified constitutional questions, see, *e.g.*, *id.* at 84 n.113; and the Court's analysis of the "political committee" provisions did not focus on the application of those provisions to any particular organization or pattern of spending. The Court's formulation of the "major purpose" test does not, by its terms, attach any significance to the distinction the court of appeals drew between contributions and independent expenditures.

Nor is there any basis for the court of appeals' suggestion that the language quoted above means only that, "when an organization controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be expenditures within the statutory definition." App. 24a. The *Buckley* Court's formulation of the "major purpose" test makes clear that the inquiry should focus on the purpose

of the *organization*, not on the purpose of a particular disbursement. See 424 U.S. at 79 (referring to "organizations * * * the major purpose of which is the nomination or election of a candidate"). The "major purpose" test, as described by the Court in *Buckley*, simply was not designed to determine whether a particular disbursement constitutes an "expenditure" within the meaning of the Act.

That point is made particularly clear by this Court's subsequent decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), in which the Court reaffirmed the "major purpose" test for status as a "political committee." A plurality of the *MCFL* Court stated that "[i]n [*Buckley*] this Court said that an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" *Id.* at 252 n.6 (quoting *Buckley*, 424 U.S. at 79). MCFL had spent nearly $10,000 in publishing a "Special Edition" of its newsletter. See *id.* at 244. The Court squarely held that the "Special Edition" contained "express advocacy" of the election or defeat of identified candidates, and that the payments made to publish it were therefore "expenditures" within the meaning of the Act. *Id.* at 248-251.

The Court nevertheless concluded that MCFL was not a "political committee." Thus, the plurality stated that it was "undisputed on this record" that MCFL did not fall within the *Buckley* Court's definition of "political committee" because MCFL's "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." 479 U.S. at 252 n.6. And the majority observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political

committee." *Id.* at 262. Thus, while squarely holding that MCFL had made expenditures well in excess of $1,000 during the year in question, the Court determined that MCFL was not a "political committee," based on its finding that campaign-related activities were not the organization's "major purpose." The *MCFL* Court's analysis is flatly inconsistent with the court of appeals' view of the "major purpose" test as merely a means to determine whether particular disbursements constitute "expenditures."

The en banc court of appeals acknowledged that "language in *Buckley* and *MCFL* can literally be read to support the FEC's position." App. 21a. The court nevertheless concluded that an organization making more than $1,000 per year in FECA "contributions" must be treated as a "political committee" whether or not its major purpose is campaign-related activity. The court of appeals erred in departing from this Court's construction of the statutory term "political committee" based on its own assessment of the competing pragmatic and constitutional concerns.

b. In any event, the premise of the court of appeals' decision—that the concerns underlying the *Buckley* Court's narrow construction of "political committee" are inapplicable to organizations that make more than $1,000 per year in contributions—is incorrect. The Court in *Buckley* recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." 424 U.S. at 64; see also, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). The *Buckley* Court concluded that, as a general matter, the Act's disclosure requirements "appear to be the least restrictive means of curbing

the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68. The Court remained concerned, however, about the potential impact of the disclosure provisions upon groups and individuals "engaged purely in issue discussion." *Id.* at 79.

The Court addressed that concern in two distinct ways. With respect to individuals and groups other than political committees, the Court construed the term "expenditure" as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80 (footnote omitted). The Court observed that "[t]his reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Ibid.* So construed, the Court held, "the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81.

The disclosure requirements applicable to political committees, however, raise distinct concerns. Political committees are required to file regular reports of *all* of their receipts and disbursements, including those relating to issue advocacy rather than campaign-related activity. As applied to an organization whose campaign-related spending constitutes a small percentage of the overall operation, the Act's disclosure requirements could place substantial burdens on core First Amendment activities while contributing only slightly to the achievement of the statutory purposes. The *Buckley* Court addressed that danger by construing the term "political committee" as limited to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Because the receipts and disbursements of such organizations "are, by definition, campaign related," *ibid.*, application of the Act's broad disclosure requirements to "political committees"

so defined can be expected to have little impact on non-campaign-related speech. The Court concluded that the purposes of both the Act and the First Amendment are properly served by construing the Act to require a group whose major purpose is campaign-related activity to report all of its receipts and disbursements, but not to impose such a broad reporting requirement (and attendant burdening of associational interests) on issue-advocacy groups that only occasionally make election expenditures.

Thus, the limiting construction given to the statutory term "political committee" in *Buckley* serves to address the danger that small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose non-campaign-related receipts and disbursements, including receipts and disbursements used for issue advocacy. As the panel in this case correctly recognized (see App. 55a), that danger is equally present whether the triggering disbursements are independent expenditures or direct contributions.[5] The en banc court

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[5] The en banc court of appeals correctly observed (see App. 21a-22a) that governmental regulation of independent expenditures raises more pressing constitutional concerns than does regulation of direct contributions. This Court has recognized a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). That constitutional difference, however, is irrelevant to the basis for and proper application of the "major purpose" test. As applied to organizations that make independent expenditures, the point of the "major purpose" test is not to prevent application of the FECA's disclosure provisions to the independent expenditures themselves. To the contrary, the *Buckley* Court made clear that reporting of independent expenditures may constitutionally be required, even where the expenditure is made by a person other than a political committee. 424 U.S. at 80-82. Rather, the "major purpose" test is designed to shield organizations that only occasionally make campaign-related expenditures from compelled

was therefore wrong in concluding (see App. 24a) that the concerns underlying the *Buckley* Court's holding are not implicated in cases involving direct contributions or coordinated expenditures.[6]

c. The en banc court of appeals also criticized the Commission's approach on the ground that

> [t]he FEC's interpretation of "political committee" would * * * allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's

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disclosure of the *other* associational and communicative activities, unrelated to electoral campaigns, that are their primary enterprise. Application of the FECA's disclosure requirements to *those* organizations is equally problematic—and equally unrelated to the FECA's purposes—whatever the nature of the campaign activities that triggered the reporting requirements in the first instance.

[6] This Court has recognized that "the Commission is precisely the type of agency to which deference should presumptively be afforded." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). The court of appeals nevertheless declined to give deference to the Commission's position here, stating that it was "not obliged to defer to an agency's interpretation of Supreme Court precedent." App. 19a. That reasoning was flawed.

Although the court of appeals characterized its task as the "interpretation of Supreme Court precedent," the court did not suggest that either *Buckley* or *MCFL* had declared the "major purpose" test to be inapplicable to groups making direct contributions. Rather, the court concluded that application of the Act's "political committee" provisions to such groups would not raise the concerns identified by the *Buckley* Court as the justification for the "major purpose" test. To the extent that the Court's construction of a statutory term leaves open additional questions about the application of the provision, the policies supporting deference to an agency's expert resolution of those questions remain applicable. That is especially so since the definition of "political committee" was reenacted in 1980 (see Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339) after this Court's decision in *Buckley*, and the question for the Commission therefore is how to interpret the Act as it *now* exists.

> overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not.*

App. 27a. That distinction, however, is inherent in the "major purpose" test adopted by this Court in *Buckley*. Even under the court of appeals' approach, "an organization spending its entire $1 million budget on [independent expenditures] would be a political committee, while another organization spending $1 million of its $100 million budget on [independent expenditures] would not." The court of appeals did not explain why that disparity is acceptable in the context of groups making independent expenditures, but an intolerable flaw that "would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of 'political committee'" (*ibid.*) when applied to groups making contributions or coordinated expenditures.

Any apparent anomaly disappears, moreover, once the justification for the *Buckley* Court's narrowing construction is understood. As we have explained, that construction addresses the danger that an organization might be subject to extensive disclosure requirements with respect to non-campaign-related receipts and disbursements based on its modest involvement in campaign activity. The hypothetical "organization spending its entire $1 million budget on campaign activity" (App. 27a) *has* no non-campaign-related receipts or disbursements. To treat such an organization differently from an organization that spends only 1% of its funds ("$1 million of its $100 million budget") on campaign activity is in no way anomalous. That disparity simply reflects the fact that the *Buckley* Court's concern—that the FECA's

disclosure requirements might have the effect of unnecessarily burdening the non-campaign-related speech of an organization that only occasionally makes election expenditures—is implicated in one situation but not in the other.

Application of the "political committee" provisions is unnecessary to ensure that significant contributions and independent expenditures are exposed to public view. Campaign-related activity by persons other than political committees is subject to extensive reporting requirements. See page 4, *supra*. Groups other than political committees are subject to other FECA provisions as well. Such groups are subject, for example, to the statutory limitation of $1,000 in contributions to any candidate for federal office. See 2 U.S.C. 441a(a)(1)(A). To require groups that are minimally involved in campaign-related activity to report *all* of their receipts and disbursements is thus unnecessary to effectuate the purposes of the Act.

The court of appeals' decision has broad ramifications for the regulated community and for issue-oriented and lobbying groups that are only tangentially related to election campaigns. The en banc court has held that any organization that spends more than $1,000 on coordinated campaign expenditures, or on direct or in-kind contributions, must abide by all of the requirements applicable to political committees. The court of appeals acknowledged that, "[o]nce designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200." App. 3a. The court made no effort, however, to address the practical and constitutional problems that arise from applying those requirements to every group that has made a single coordinated expenditure of more than $1,000.

d. In light of the unusual statutory provisions governing challenges to the Commission's enforcement

decisions, review by this Court is warranted even in the absence of a conflict in the circuits. The Commission's decision to dismiss a complaint filed by a private party is reviewable only in the United States District Court for the District of Columbia. 2 U.S.C. 437g(a)(8)(A). When the Commission finds probable cause to believe that a violation of the FECA has occurred, however, any enforcement action must be brought by the Commission "in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business." 2 U.S.C. 437g(a)(6)(A).

The court of appeals' decision in this case, if not reviewed by this Court, will place the Commission in an untenable position. If the FEC adheres to its current definition of "political committee," and declines to bring an enforcement action under 2 U.S.C. 433 and 434 unless the "major purpose" test is satisfied, its dismissal of private parties' complaints will always be subject to challenge in the D.C. Circuit. The question presented in this case will come before another court of appeals only if the Commission brings an enforcement action premised on the D.C. Circuit's interpretation of the statute. The Commission believes, however, that the D.C. Circuit's decision raises unnecessary practical and constitutional questions, rests on an erroneous construction of the Act, and is directly contrary to this Court's decisions in *Buckley* and *MCFL*.

2. The court of appeals also erred in holding that respondents had standing to bring their suit. Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, No. 95-813 (Mar. 19, 1997), slip op. 6. See also, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

The complaint filed in this case does not challenge any exercise of regulatory authority over respondents themselves. Nor do respondents assert a right to obtain information that is actually in the government's possession. Cf. *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 449 (1989) (Court's "decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records"). Rather, respondents challenge the Commission's failure to take enforcement action against another private party concerning information in that party's possession. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Defenders of Wildlife*, 504 U.S. at 562 (internal quotation marks omitted). In the present case, respondents fail to satisfy the requirements of Article III.[7]

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[7] The court of appeals suggested that the Commission had conceded respondent Findley's standing as a candidate. See App. 6a & n.2. That is incorrect. Respondents did not allege that Findley had standing as a candidate or intended to run for office in the future, although they did allege that Findley was a former member of the House of Representatives. The FEC's brief to the en banc court noted the absence of any allegation that respondents were candidates. FEC C.A. In Banc Br. 22.

a. The court of appeals concluded that respondents had established standing as "affected voters," reasoning that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself." App. 12a. The court of appeals' only basis for describing respondents as "affected" voters distinct from the electorate as a whole is its statement that "there is nothing to indicate that [respondents] did not vote in various federal elections in which AIPAC allegedly made contributions that qualified it as a political committee." App. 13a. That statement provides no justification for the court's finding of a "particularized injury." Any injury respondents may suffer is shared by all voters in elections in which AIPAC engaged in campaign activity, and the agency action they seek to compel "no more directly and tangibly benefits [them] than it does the public at large." *Defenders of Wildlife*, 504 U.S. at 574. Respondents' alleged injury is thus insufficiently concrete and personal to establish an injury in fact under Article III. Rather, the "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). "[T]hat harm alone normally does not warrant exercise of jurisdiction." *Ibid.*

In any event, the statutory provision under which respondents have sued, 2 U.S.C. 437g(a)(8), provides for a party who filed a complaint that was subsequently dismissed by the Commission to file a petition for review in the district court only if that party has been "aggrieved" by the dismissal. Cf. *Liquid Carbonic Indus.*

Corp. v. *FERC*, 29 F.3d 697, 702 (D.C. Cir. 1994) (Federal Power Act provision authorizing judicial review for "[a]ny party * * * aggrieved" is narrower than Administrative Procedure Act's judicial review provision, 5 U.S.C. 702). In light of the generalized nature of the grievance respondents raise—and the background rule that private persons do not have a judicially cognizable interest in the decision by the government not to take an enforcement action against a third party (see, *e.g.*, *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973))—Section 437g(a)(8) should not be construed so broadly as to encompass respondents' claim. The courts should not lightly conclude that Congress intended to include persons such as respondents as parties "aggrieved" by the Commission's dismissal of a complaint seeking to require it to bring an enforcement action against a private organization with respect to disclosure of all the organization's receipts and disbursements. Compare *Bennett* v. *Spear*, slip op. 8 ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated.").

b. Nor can respondents establish standing as "competitors" of AIPAC. Insofar as respondents assert a diminution of their ability to lobby U.S. policymakers, the traceability and redressability analysis must focus on the presence or absence of a causal link between the Commission's dismissal of the administrative complaint and respondents' ability to influence U.S. policy towards the Middle East. That purported causal connection is too speculative to satisfy Article III. Respondents have offered no basis for concluding that AIPAC's compliance with the requirements of Sections 433 and 434 would make an "appreciable difference," *Allen* v. *Wright*, 468 U.S. at 758, in their ability to effect changes in U.S. foreign policy. Any such impact would depend entirely upon the subjective reactions of Members of Congress and of the

public to the information disclosed. Because "a federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court," *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 41-42, respondents' claim of competitive injury is not sufficient to invoke the federal judicial power.[8]

c. Even if the FEC were to find probable cause to believe that AIPAC had violated Sections 433 and 434, the Commission is not required to institute a civil enforcement action in every instance in which it concludes that a violation has occurred.[9] Moreover, there is no guarantee

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[8] In any event, respondents' alleged competitive injury is not a sufficient basis for concluding that they are "aggrieved," within the meaning of Section 437g(a)(8), by the Commission's dismissal of their complaint. Respondents' desire to engage in more effective lobbying is only fortuitously related to the purposes of the FECA's disclosure requirements, which are directed to election campaigns.

[9] AIPAC has contended that the alleged contributions in this case involved communications to AIPAC's own members, which are specifically exempted from the statutory definition of "expenditure." See note 3, *supra*. The Commission rejected that argument and found probable cause to believe that AIPAC had violated the ban on corporate campaign expenditures and contributions set forth in 2 U.S.C. 441b. The FEC declined to take further action with respect to that finding, however, because it believed that the case "presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this." App. 98a; see note 3, *supra*. Respondents have not challenged the Commission's authority to exercise its prosecutorial discretion in that manner.

Even under the court of appeals' view of the statute, any finding that AIPAC is in violation of the FECA provisions governing "political committees" would depend upon the antecedent determination that the communications at issue are properly characterized as contributions—*i.e.*, that they were sent to persons other than AIPAC's own members. That is the same determination that the Commission regarded as suf-

that any remedy imposed by a court, or negotiated by the Commission as part of a conciliation agreement, see 2 U.S.C. 437g(a)(4)(A)(i), would result in the disclosures that respondents seek. The parties have little or no idea whether AIPAC has retained the information sought by respondents; a monetary penalty might be deemed a sufficient remedy to forgo enforcement litigation; and the Act does not provide for judicial review of conciliation agreements. Compare 2 U.S.C. 437g(a)(5) with 2 U.S.C. 437g(a)(8)(A).

d. Finally, respondents' claim of competitive standing is especially weak in the instant case, since the court of appeals' resolution of the "political committee" issue has no effect on the legality vel non of AIPAC's political spending. As a corporation, AIPAC is entirely forbidden to make any contributions or expenditures in federal election campaigns. 2 U.S.C. 441b.[10] Because Section 441b prohibits AIPAC from making campaign contributions *at*

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ficiently close so as to warrant a decision to take no further action with respect to Section 441b.

[10] In *MCFL*, this Court recognized a narrow, constitutionally based exception to Section 441b's ban on corporate campaign expenditures. The Court noted that MCFL (1) "was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 264. The Court concluded on that basis "that § 441b's restriction of independent spending is unconstitutional as applied to MCFL." *Id.* at 263.

In the instant case, the FEC's General Counsel concluded that AIPAC does not fall within the *MCFL* exception to Section 441b because AIPAC has accepted contributions from business corporations. C.A. App. 192-194. In any event, the *MCFL* exception applies only to independent expenditures. See 479 U.S. at 259-260, 263. AIPAC would therefore be prohibited from making direct or in-kind contributions even if it satisfied the criteria set forth in *MCFL*.

all, the manner in which Section 431(4)(A) is applied to groups that contribute more than $1,000 to political campaigns can have little practical effect on AIPAC's activities.

As noted above (see notes 3 and 9, *supra*), AIPAC has consistently argued that the payments at issue in this case involved communications to AIPAC's own members. If (as the Commission has concluded, see App. 98a) AIPAC failed to satisfy the FEC's membership criteria, Section 441b would prohibit the organization from making those payments. If AIPAC's position ultimately prevails, there would be no basis for concluding that the organization had made contributions in excess of $1,000, and consequently no basis for concluding that AIPAC was a "political committee" within the meaning of Section 431(4)(A), whether or not a "major purpose" test applies.[11] There is no reason to suppose that AIPAC's political spending would be altered, or respondents' interests advanced, by a determination that AIPAC was in violation of Sections 433 and 434 as well as of Section 441b.

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[11] The Commission's statement of reasons in this case, issued on July 27, 1992, noted that the FEC "anticipate[d] the Commission soon will conduct a regulatory proceeding to review its membership criteria in an effort to eliminate confusion about these requirements." App. 99a. In 1993 the Commission promulgated a new regulatory definition of the term "member." See 58 Fed. Reg. 45,775 (codified at 11 C.F.R. 114.1(e)(2)). During the pendency of the appeal in this case, the D.C. Circuit invalidated that regulation, concluding that it defined the term "member" in an unduly restrictive fashion. See *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 604-606 (1995). That decision casts further doubt on respondents' prospects of ultimately obtaining an order compelling disclosure of AIPAC's receipts and disbursements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1997

Supreme Court, U.S.
FILED

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No.

CLERK OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 94-5088

JAMES E. AKINS, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, APPELLEE

[Argued May 8, 1996]
[Decided Dec. 6, 1996]
[As Amended Jan. 3, 1997]

OPINION

Before: EDWARDS, Chief Judge, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, Circuit Judges, and BUCKLEY,* Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Dissenting opinion filed by Circuit Judge SENTELLE.

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* At the time of en banc argument, Judge Buckley was a circuit judge in active service. He assumed senior status on September 1, 1996.

SILBERMAN, Circuit Judge:

Appellants challenge the district court's grant of summary judgment. The court affirmed the Federal Election Commission's dismissal of appellants' administrative complaint, which had alleged that the American Israel Public Affairs Committee (AIPAC) was a "political committee" subject to relevant reporting and disclosure requirements and contribution and expenditure limits of the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431-55 (1994 & Supp.1996). The court thought reasonable the Commission's definition of "political committee" as including only organizations that, in addition to meeting the statutory $1,000 expenditure threshold, have as their major purpose campaign related activity. We reverse.

I.

James E. Akins, Richard Curtiss, Paul Findley, Robert J. Hanks, Andrew Killgore, and Orin Parker (collectively appellants) are former ambassadors, congressmen, or government officials. They are registered voters and "politically active persons who . . . oppose AIPAC views on U.S. foreign policy in the Middle East" and who "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public." Paul Findley is a former congressman from Illinois "widely perceived to be friendly to the Arab cause"; AIPAC is alleged to have helped to defeat him in the 1982 congressional election. AIPAC is an incorporated, tax-exempt organization with approximately 50,000 supporters nationwide and a budget of about $10 million (as of 1989) that lobbies Congress and the executive branch for military and economic aid to

Israel and generally encourages close relations with Israel.

Appellants filed a complaint with the FEC in 1989, alleging *inter alia* that AIPAC had made campaign contributions and expenditures in excess of $1,000 and was therefore a political committee. A political committee is defined as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (emphasis added). "Expenditure" is defined in turn as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election." 2 U.S.C. § 431(9)(A)(i). Expenditures have been classified by caselaw and FEC interpretation to include three categories: independent expenditures not connected to any candidate, coordinated expenditures made in cooperation or consultation with a candidate, and direct contributions to a candidate. Once designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200. *See* 2 U.S.C. § 434(b)(2)-(5). And it is prohibited from contributing more than $1,000 to any candidate. See 2 U.S.C. § 441a(a). Appellants claimed that AIPAC met the statutory definition of political committee because, for example, it used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meet-

ings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates. Since these activities cost more than $1,000, AIPAC's failure to register as a political committee and comply with the requirements was a violation of the Act. *See* 2 U.S.C. §§ 433; 434(a)(1), (b); 441a(1), (2).

The General Counsel investigated the allegations and issued a report in 1992, making recommendations that were subsequently adopted by the Commission. The Commission determined that AIPAC likely had made campaign contributions exceeding the $1,000 threshold, but concluded that there was not probable cause to believe AIPAC was a political committee because its campaign-related activities were only a small portion of its overall activities and not its major purpose. The campaign activities were only conducted in support of its lobbying activities. No precedent was cited or rationale given, in the General Counsel's brief, his report, or the Commission's order, to support this interpretation of the statutory definition of "political committee." The Commission did find probable cause to believe that AIPAC violated § 441b, which generally prohibits campaign expenditures and contributions by corporations, but voted to take no action because it thought it was a close question whether AIPAC's expenditures were made in the course of communicating with its members, an exception to § 441b's prohibition. It therefore dismissed the complaint and closed the case.

Appellants sued in the district court pursuant to § 437g(a)(8), an unusual statutory provision which permits a complainant to bring to federal court an agency's refusal to institute enforcement proceedings, *cf. Heckler v. Chaney*, 470 U.S. 821, 831, 105

S.Ct. 1649, 1655-56, 84 L.Ed.2d 714 (1985), challenging the Commission's interpretation of the term "political committee."[1] The Commission responded that the Supreme Court, concerned with the Act's burdens on political speech, had narrowed the term's statutory definition in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (MCFL). The Commission read these opinions—at least it so asserted in district court—as holding that an organization is a political committee only if its major purpose is the influencing of federal elections. Therefore, notwithstanding the plain language, the Commission claimed it interpreted the statute at least reasonably.

The district court agreed. Combining the Supreme Court's opinions (and our decision in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir.), cert. denied, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981)), with *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) deference, the court concluded that the Commission's construction was "reasonable." A divided panel of this court affirmed. The FEC had not originally challenged appellants' standing, but the panel sua sponte asked the parties to brief the issue. The panel majority concluded that appellants had suffered an "informa-

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[1] Appellants also contest some of the Commission's factual conclusions. In particular, they question the Commission's determination that there was a lack of credible evidence concerning AIPAC's involvement in providing assistance to the opponent of Paul Findley—a complainant here—in a 1982 congressional election.

tional injury" as voters and members of the public; the lack of information on AIPAC's contributions and expenditures, caused by the FEC's action, limited the information available to them as voters and impaired their ability to influence and inform the public and policymakers. The dissent thought appellants' injury was based instead on their competitive lobbying position vis-a-vis AIPAC. We determined to rehear the case en banc and directed the parties to focus on standing as well as the merits.

II.

The Commission, as it did before the panel (after it was asked to address standing), challenges the court's jurisdiction. The Commission contends that neither the theories adopted by the panel judges nor appellants' somewhat different contentions satisfy Article III standing requirements. Appellants—whether as voters or political competitors (except for Findley whose standing as a candidate the Commission does not challenge[2])—not only lack injury-in-fact, their alleged injury was not caused by the Commission's actions and it is not redressable by this court's order. It is further argued that even if appellants make out Article III standing, they are not parties "aggrieved" under the statute and so lack prudential standing.

We take up first appellants' standing as voters. We have recognized in our "informational standing" cases that a party may be entitled to sue in federal court to force the government to provide information

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[2] The Commission does not explain why, if Findley does have standing, the rest of its standing objections are nonetheless determinative, because we would still be obliged to reach the merits.

to the public (and thereby to it) if the government's failure to provide or cause others to provide that particular information specially affects that party. But this type of injury is narrowly defined; the failure must impinge on the plaintiff's daily operations or make normal operations infeasible in order to create injury-in-fact. Compare *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C. Cir. 1973) (the Atomic Energy Commission's decision not to provide an Environmental Impact Statement (EIS) on a reactor program established Article III injury because the Institute's main function was to distribute such information to the public), and *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (Article III injury where new government regulations restricting the availability of information on services for the elderly impaired AASC's ability to provide information, counseling, and referral services for its senior citizen members), *vacated on other grounds*, 494 U.S. 1001, 110 S.Ct. 1329, 108 L.Ed.2d 469 (1990), with *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 122-23 (D.C. Cir. 1990) (no informational injury where organization failed to show how the NHTSA's decision not to issue an EIS significantly diminished its ability to educate and inform the public about highway safety). Appellants' alleged injury as voters does not seem to fit within the limited contours of our informational standing cases. They do assert that their injury is based on the FEC's failure to provide appellants, as voters, with certain information, but their injury does not depend on the character of their organizational activity but rather on the proposition that the deprivation of that information impedes their ability to

engage in a particular act guaranteed them in a democracy. They have been deprived of certain specific information that Congress thought voters needed to make an informed choice and therefore required "political committees," *inter alia*, to disclose.

Although Congress may not "create" an Article III injury that the federal judiciary would not recognize, anymore than Congress could amend the Constitution, see *United Transp. Union v. ICC*, 891 F.2d 908, 915-16 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3271, 111 L.Ed.2d 781 (1990); *Safir v. Dole*, 718 F.2d 475, 479 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206, 104 S.Ct. 2389, 81 L.Ed.2d 347 (1984), Congress can create a legal right (and, typically, a cause of action to protect that right) the interference with which will create an Article III injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S.Ct. 2130, 2145-46, 119 L.Ed.2d 351 (1992) (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2205-06, 45 L.Ed.2d 343 (1975)); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S.Ct. 1114, 1121, 71 L.Ed.2d 214 (1982). Such a legal right can be given to all persons in the country. In that event, any person whose individual right has been frustrated or interfered with has standing to sue, even though all other persons have the same right, without the claim being regarded as a generalized grievance. That is why anyone denied information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* (1994), has standing to sue regardless of his or her reasons

for suing. *Public Citizen v. FTC*, 869 F.2d 1541, 1548 & n. 13 (D.C. Cir. 1989).[3]

Appellants would analogize this case to a FOIA case; any and all voters, in their view, suffer injury-in-fact when the FEC fails to force a political committee to report its activities to the Commission, which then has an obligation under the statute to make such information available to the public. See 2 U.S.C. § 438(a)(4) (requiring Commission to make all information filed promptly available to the public). But Congress did not quite create a legal right in all individual voters to obtain that information either directly or indirectly. The mere denial of an attempt to gain information does not create a cognizable injury under the Act. An individual must file a complaint with the Commission, which is provided authority to enforce the requirement that political committees report their activities. Only parties aggrieved by the dismissal of a complaint are entitled to challenge in court the Commission's refusal to enforce. (Although under § 437g(a)(8)(C), if a court decision directing the Commission to act is ignored by the FEC, the complainant can actually sue the offending party directly.) This indicates that the statutory entitlement to information is not as categorical or direct as that of FOIA.[4]

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[3] The dissent's logic suggests that even such a claim is only a generalized grievance; otherwise, to use the dissent's phraseology, the dissent "ducks the consequences" of admitting that all Americans could sue. Dissent at 2.

[4] By contrast to FOIA, the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (1994), does not provide a private right of action to enforce the EIS procedural requirements. To show standing, the litigant therefore must allege that he will be harmed by the underlying agency action contemplated,

While a voter's rights under the Act are not exactly analogous to FOIA, appellants do have a point, and it is a point that distinguishes this case somewhat from our informational standing cases. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 449-50, 109 S.Ct. 2558, 2564-65, 105 L.Ed.2d 377 (1989) (analogizing requests for access to information under the Federal Advisory Committee Act (FACA) to requests under FOIA). Congress clearly intended voters to have access to the information political committees were obliged to report. The whole theory of the statute is that voters are benefitted insofar as they can determine who is contributing what to whom. *See Buckley*, 424 U.S. at 66-67, 96 S.Ct. at 657 (disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office," deters actual corruption and the appearance of corruption, and helps the public detect post-election *quid pro quos*). Although Congress cannot determine when someone has suffered Article III injury, we do not think it can be denied that this sort of information that Congress required disclosed aids voters, if and when they vote. If a party is denied information that will help it in making a transaction—and a vote can be

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and that if forced to prepare (and consider) an EIS, the agency might act differently. See *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 n. 6 (9th Cir. 1995), *cert. denied*, — U.S. ——, 116 S.Ct. 698, 133 L.Ed.2d 655 (1996); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 (D.C. Cir. 1991). Thus, the lack of the information itself is not an injury. Here, the injury is closer to the FOIA model; the injury to the voter is the lack of the information itself, and the only underlying agency action is the failure to require disclosure.

thought of as a kind of transaction—that party is obviously injured in fact. We recognized as much in *Public Citizen*, 869 F.2d at 1546 & n. 7, where we determined that a group representing consumers had standing to challenge the FTC's regulations exempting from health warnings certain promotional items sold by manufacturers of smokeless tobacco. Those promotional items, a form of advertising, were designed to encourage the purchase of smokeless tobacco, and some of the plaintiffs' members and their families alleged that they used or may use those products without the statutorily required reminder of the dangers that consumption entails. We reasoned that such information would be of substantial value to the plaintiffs' members, and therefore they were injured because they were deprived of it at the time they purchased or used the product. *Id.*

Although admittedly registered voters—even the more limited subset of those who actually vote—is a very large group of Americans, we do not think it analytically sound to describe a lawsuit brought by affected registered voters as presenting only a generalized grievance. The term "generalized grievance" does not just refer to the number of persons who are allegedly injured; it refers to the diffuse and abstract nature of the injury. *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (citizen and taxpayer challenge to membership of members of Congress in Armed Forces Reserves during Vietnam War presents generalized grievance); *see* also *Lujan v. Defenders of Wildlife*, 504 U.S. at 573-74, 112 S.Ct. at 2143-44. The number of potential plaintiffs matters not so long as each can assert a distinct, individual

injury. *See Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1365-66, 31 L.Ed.2d 636 (1972); *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994). A voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time bids are due, would suffer a particularized injury even if all other bidders also suffered an injury. As we understand our dissenting colleagues, they agree with the Commission that appellants are presenting a generalized grievance because it is information that they seek. Apparently if Congress provided that public or private employers were obliged to provide their employees free transportation to the polls, enforceable through an agency like the FEC, that would be a particularized right (except that according to Section B of their opinion it would not be redressable). We think the dissent is just incorrect in refusing to see information as a commodity of value.[5]

To be sure, it would not be enough for standing in this case for appellants to assert only that they were voters, for appellants would not be injured as voters if AIPAC's activities were unrelated to any election in which they voted. But appellants can hardly be expected to allege that AIPAC made contributions in the elections in which they voted, for whether AIPAC made such contributions is precisely the information

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[5] Since the dissent concedes that all appellants would have standing if the information had been supplied to the FEC and then simply withheld, Dissent at 746-47, 745 n.2, it would appear that the dissent's only real objection to standing is redressability.

of which appellants claim they have been deprived. As the FEC found that AIPAC likely did contribute in excess of $1,000 in one year, and the FEC did not identify the elections to which these contributions were made, there is nothing to indicate that appellants did not vote in various federal elections in which AIPAC allegedly made contributions that qualified it as a political committee. Therefore we conclude that appellants have standing as affected voters. We thus need not resolve whether appellants also have standing as political competitors of AIPAC, or whether Mr. Findley—who was last a candidate in 1982, *see Golden v. Zwickler*, 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (no controversy where it was unlikely that congressman would again be a candidate for Congress)—has standing as a candidate.

The Commission also questions the causal connection between its decision and appellants' injury, as well as causation's corollary in standing analysis—redressability. As best we understand the FEC's rather confusing argument,[6] its causation objection is primarily directed to appellants' alleged lobbying injury rather than their injury as voters. That the Commission does not make the argument vis-a-vis appellants' standing as voters is understandable because such a theory would stretch causation to its breaking point; no one would have standing to challenge the Commission's determination, or for that matter, many other administrative agency actions. It is only necessary for a voter to allege that his vote and others' votes may have been affected by the

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[6] Appellants did not, it should be noted, provide much help on the difficult standing issue in this case.

disclosure of information that a contrary FEC determination would have made available.

The Commission's argument that appellants lack standing because we cannot issue an order that redresses their injury—with which the dissent agrees—strikes us as a breathtaking attack on the legitimacy of virtually all judicial review of agency action. The Commission points out that it has enforcement discretion, so that even if we were to determine that its statutory interpretation of "political committee" is erroneous, it does not follow that AIPAC would be required to disclose the information a political committee must: the FEC might settle with AIPAC on terms that did not require disclosure. Yet all regulatory agencies enjoy some measure of enforcement discretion. If that factor were to mean that an agency's legal determination was not reviewable, that would virtually end judicial review of agency action. We rarely know when we entertain a case, say, challenging an agency's interpretation of a statute, whether the agency's ultimate action will be favorable to the petitioner or appellant. *See Public Citizen*, 491 U.S. at 450, 109 S.Ct. at 2564-65 (that FACA documents may not be disclosed pursuant to statutory exceptions no bar to redressability); *Competitive Enter. Instit.*, 901 F.2d at 118 ("[a] remand that would leave the agency free to exercise its discretion in a proper manner, then, could lead to agency action that would redress petitioners' injury") (emphasis added); *Foundation on Economic Trends v. Lyng*, 943 F.2d at 83 & n. 2 (plaintiff typically not required to show that the agency was likely to take a particular substantive action in response to EIS). Our job is limited to

correcting a legal error—if error is committed—in the agency decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-97, 67 S.Ct. 1575, 1577-78, 91 L.Ed. 1995 (1947). The error must, of course, be one upon which the agency decision rests, an analytical precondition to the agency action. If that is so, it has always been an acceptable feature of judicial review of agency action that a petitioner's "injury" is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning. *See id.*

Nor can it be relevant, as the dissent supposes, that AIPAC might not comply with the Commission's order. That too is always true when an agency's nonaction against a third party is challenged. In any event, under this very unusual statute appellants are not dependent on the Commission's compliance with our decision correcting the Commission's interpretation of the phrase "political committee." As we noted earlier, if the Commission fails to "conform" to our "declaration," the appellants, as the original complainant, may bring their own civil action to remedy the violation of law. 2 U.S.C. § 437g(a)(8)(C). It would appear under this provision that if the Commission gave only lip service to compliance with our order and settled with AIPAC without requiring disclosure, as the dissent suggests could occur, appellants would be able to seek disclosure directly. This unique statutory provision then completely undermines the Commission's and the dissent's redressability argument—even on the argument's own terms.[7]

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[7] In an argument that seems to be based more on mootness than redressability, the Commission also contends that appellants' injury would not be redressed by a favorable decision of

Finally, the Commission challenges appellants' prudential standing, claiming they are not parties aggrieved within the meaning of the statute, which provides that "any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . may file a petition with the United States District Court for the District of Columbia." 2 U.S.C. § 437g(a)(8)(A). The Supreme Court, interpreting similar language in the Administrative Procedure Act permitting judicial review generally if a party is "aggrieved," has held that term obliges federal courts to determine whether, under the substantive statute, the party seeking judicial review is within the zone of interests. Thus

> [i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no

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this court because AIPAC is barred from making future contributions to candidates by another section of the statute, § 441b, which prohibits corporate contributions. This is a non sequitur; appellants claim they are injured because AIPAC was permitted to avoid registering as a political committee and disclosing its past receipts and expenditures. That disclosure of past activities would presumably affect voters in the future. If such injury were not redressable, once an election ended virtually all electoral conduct would be beyond review. In this case, for example, it took well over two years for the Commission to make a probable cause determination.

> indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987) (citations omitted) (emphasis added). Here, although the governing judicial review provision is included within the substantive statute, the same test logically should apply to determine whether a party challenging a Commission decision qualifies. But why would appellants not meet that test? The Commission's argument again is rather convoluted. It concedes, as it surely must, that the statute is designed primarily to aid voters, *Buckley*, 424 U.S. at 66-67, 96 S.Ct. at 657-58; therefore, it seems strange to even suggest that a voter would not have prudential standing. Yet the Commission asserts that "a pure voter's interest [is] too generalized to satisfy Article III or the zone of interests test" (emphasis added). We have already explained why we do not regard appellants' case as presenting a "generalized grievance." *See supra* pp. 737-38. And although the numbers of persons who might be eligible to sue might well bear on a determination as to whether Congress intended such a broad class of potential litigants, in this case it is apparent that Congress treated the broad class—voters—as the core beneficiaries of the statute. Therefore, we simply cannot glean any congressional intent to preclude members of that class from suing—so long as they filed a complaint with the FEC that was dismissed.[8]

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[8] It is not clear from the Commission's argument who would have prudential standing. Although the fact that no one would have standing to sue is not a reason to find Article III standing, *Schlesinger v. Reservists*, 418 U.S. at 227, 94 S.Ct. at

The Commission contends that "aggrieved" must be read to require a more direct connection to or a greater stake in the conduct in question, call it "voter plus" status. But appellants are not merely voters; they are voters who have filed a complaint with the Commission that has been dismissed. In sum, appellants' interests as voters clearly are not "so marginally related to or inconsistent with the purposes implicit in the statute," *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757, for it to be unreasonable to assume Congress intended to permit them to sue.

III.

Section 431(4)(A) defines "political committee" solely in terms of "expenditures" and "contributions": a political committee is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." The FEC concedes that this language sets unambiguous requirements for classification as a political committee. But it asserts that Supreme Court decisions have narrowed the reach of the statutory language in response to First Amendment concerns. The FEC relies on language in *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, and *MCFL*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, in claiming that an organization should only be classified as a political committee if, in addition to exceeding the $1,000

2935, the same cannot be said for prudential standing. Where Congress has created a right to seek judicial review, see 2 U.S.C. § 437g(a)(8), it cannot be the case that Congress intended that right to extend to no one.

expenditure limit, the organization's major purpose is the nomination or election of a candidate or the organization is controlled by a political candidate.

At minimum, the Commission argues, these cases created an ambiguity in the statutory definition of "political committee" so that the Commission's subsequent interpretation of the term is owed deference—and passes muster—under Chevron Step II. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). When Congress is silent or ambiguous, the Commission reminds us, an agency's construction is owed deference if it is permissible. That the ambiguity here arose from Supreme Court interpretation does not, it is argued, affect this general rule of deference; the agency still has discretion to fill the interpretive "gap." According to the FEC, the gap to be addressed here is not whether the Court established a major purpose test as a generic definition of political committee (which the Commission assumes), but how such a test is to be implemented. Since the Court did not decide the types of organizations that are within its "definition" of political committee, whether contributions and expenditures are treated the same, and so on, the Commission has discretion to flesh out the concept, consistent with Supreme Court precedent.

We think the FEC's plea for deference is doctrinally misconceived. It is undisputed that the statutory language is not in issue, but only the limitation—or really the extent of the limitation—put on this language by Supreme Court decisions. We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any

other principle. The Commission's assertion that Congress and the Court are equivalent in this respect is inconsistent with *Chevron*'s basic premise. *Chevron* recognized that Congress delegates policymaking functions to agencies, so deference by the courts to agencies' statutory interpretations of ambiguous language is appropriate. But the Supreme Court does not, of course, have a similar relationship to agencies, and agencies have no special qualifications or legitimacy in interpreting Court opinions. There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions. This is especially true where, as here, the Supreme Court precedent is based on constitutional concerns, which is an area of presumed judicial competence. *See Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988).

In sum, since it is not, and cannot be, contended that the statutory language itself is ambiguous, and the asserted "ambiguity" only arises because of the Supreme Court's narrowing opinions, we must decide *de novo* the precise impact of those opinions. In that regard, we think the Commission misstates the interpretation issue. As we noted, it casts the question as how the major purpose test applies, as if the test were set forth categorically. But as we see the key question, it is whether the Supreme Court's major purpose limitation imposed in certain circumstances for constitutional reasons applies in another circumstance—this case—in which the same constitutional concerns may not be implicated.

Turning to the Supreme Court's decisions, the Court did state in *Buckley* that the term political committee "need only encompass organizations that

are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79, 96 S.Ct. at 663 (emphasis added). And this notion was repeated in *MCFL*: "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 479 U.S. at 252 n. 6, 107 S.Ct. at 625 n. 6 (quoting *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663). Although *MCFL* apparently was not charged with violating the political committee provisions, the Court in dicta said that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262, 107 S.Ct. at 630.

While the above language in *Buckley* and *MCFL* can literally be read to support the FEC's position, both cases focused on the constitutional concerns raised by independent expenditures, which are not coordinated with or made in consultation with any candidate, as distinguished from coordinated expenditures or direct contributions. *See Colorado Republican Fed. Campaign Comm. v. FEC*, — U.S. ——, — — - ——, 116 S.Ct. 2309, 2315-16, 135 L.Ed.2d 795 (1996). Independent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption. *Buckley*, 424 U.S. at 19-23, 78-81, 96 S.Ct. at 634-37, 663-64; *MCFL*, 479 U.S. at 259-60, 107 S.Ct. at 628-29. They raise more serious First Amendment concerns because it is difficult to deter-

mine when an expenditure is independent, and regulation therefore risks chilling protected speech. For that reason, in *Buckley* the Supreme Court determined that expenditure limits are more likely to violate the First Amendment because they place substantial and direct restrictions on the ability to engage in political speech. *See* 424 U.S. at 39-59, 96 S.Ct. at 644-54. Limitations on contributions or coordinated expenditures, on the other hand, were thought to raise fewer constitutional concerns because they serve the basic governmental interest of protecting the electoral process while only marginally restricting political debate and discussion. *See Colorado Republican Fed. Campaign Comm.*, — U.S. at ——, 116 S.Ct. at 2315; *Buckley*, 424 U.S. at 28, 96 S.Ct. at 639 (such limits "focus[ ] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified"); *see also Buckley*, 424 U.S. at 28, 30, 36, 96 S.Ct. at 639, 640, 643.

To support its interpretation, the FEC points to *Buckley*'s discussion of § 434(e), which imposes disclosure requirements on "[e]very person (other than a political committee or candidate)" making contributions or expenditures exceeding $100.[9] "Contributions"—when defined as direct or indirect contributions to a candidate, political party, or campaign committee, or expenditures placed with the

[9] Section 434(e) has subsequently been amended: "Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year" shall be subject to certain reporting and disclosure requirements. 2 U.S.C. § 434(c)(1).

cooperation or consent of a candidate—were determined to "have a sufficiently close relationship to the goals of the Act," and therefore limits on them are constitutional. *Id.* at 78, 96 S.Ct. at 663. The Court noted that the meaning of "expenditure," however, posed line-drawing difficulties because it posed the danger of "encompassing both issue discussion and advocacy of a political result." *Id.* at 79, 96 S.Ct. at 663. Therefore, the reach of § 434(e) was limited by "construe[ing] 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80, 96 S.Ct. at 663. In the midst of this analysis of the scope of "expenditures" under § 434(e), the Court noted in dicta that the meaning of political committee, because it was defined solely in terms of contributions and expenditures, posed the same line-drawing problem. The Court's language that apparently refers to the major purpose of an organization, given this context, does not really support the Commission's interpretation:

> To fulfill the purposes of [FECA, political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79, 96 S.Ct. at 663 (emphases added). We think the better interpretation of this language, as appel-

lants suggest, is that when an organization controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be expenditures within the statutory definition. The Court clearly distinguished independent expenditures and contributions as to their constitutional significance, and its references to a "major purpose" test seem to implicate only the former.

As we noted, certain language in *MCFL* can also be read to support the FEC's position, but the Court was again addressing First Amendment problems with the regulation of independent expenditures. The Court held that § 441b, which prohibits corporate contributions or expenditures "in connection with any election," was unconstitutional as applied to *MCFL* because the Act's reporting and disclosure requirements might discourage protected political speech of such advocacy groups. *See* 479 U.S. at 253-56, 107 S.Ct. at 625-27. Still, the Court's analysis clearly distinguished contributions and expenditures: "should *MCFL*'s independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262, 107 S.Ct. at 630 (citing *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663) (emphasis added). ~~As in~~ *Buckley*, this language can be read as merely creating a presumption that certain organizations' expenditures are "made . . . for the purpose of influencing any election"; an organization devoted almost entirely to campaign spending could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it. As in *Buckley*, the underlying concern is that congressional regulation, in its effort to achieve full disclosure, may impermissibly discourage protected independent expenditures. In short, the Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case. There is no constitutional problem with applying § 431(4)(A) to AIPAC or to other organizations making campaign contributions (or coordinated expenditures) exceeding the statutory limits.[10]

The FEC further contends, however, that we endorsed its "major purpose" test in Machinists Non-Partisan Political League, 655 F.2d at 392. In Machinists, we held that "draft groups" that promoted the acceptance of particular individuals prior to their actual nomination did not fall within the definition of "political committee" because the expenditures and contributions were not made to a "candidate." *Id.* at 396. Our decision was based in large part on Congress' intent to exclude draft groups from the definition of political committee. *See id.* at 394-96 (Congress failed to respond to the FEC's repeated requests to amend the Act to apply contribution limits to draft groups). And our analysis, contrary to the FEC's suggestion, supports appellants' interpretation of the major purpose test. We

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[10] The Commission makes no claim that AIPAC actually qualifies for the *MCFL* constitutional exemption, which requires that the organization be engaged in issue advocacy, that it not accept contributions from labor unions or corporations, and that it have no shareholders or other persons with a claim on its assets who would have a disincentive to withdraw if they disagreed with its political positions. 479 U.S. at 264, 107 S.Ct. at 631. Indeed, the General Counsel's brief advised that AIPAC did not qualify because it apparently receives certain contributions from corporations.

did quote *Buckley*'s language—noted above to be equivocal—on an organization's major purpose. *Id.* at 392. But we concluded that *Buckley* had endorsed the "narrowing construction" of "political committee" developed in *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir.1972) (*NCFI*), and *American Civil Liberties Union, Inc. v. Jennings*, 366 F.Supp. 1041 (D. D.C. 1973) (*ACLU*) (three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030, 95 S.Ct. 2646, 45 L.Ed.2d 686 (1975), and we noted that "[a]ll three of these decisions recognized the grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a 'candidate,' or directly related to promoting or defeating a clearly identified 'candidate' for federal office." *Id.* at 393 (emphasis added). Our use of the word "activities"—while admittedly not free from ambiguity—indicates that, as appellants contend, it is the purpose of the organization's disbursements, not of the organization itself, that is relevant.[11]

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[11] Appellants argue that the major purpose test is properly employed to determine whether an organization's independent disbursements constitute "expenditures" within the meaning of § 431(9)(A)(i), such that they count toward the $1,000 limit defining political committee status. *See NCFI*, 469 F.2d 1135; *ACLU*, 366 F.Supp. 1041. We do not for purposes of this appeal have to determine finally whether appellants' version of the test is the only possible one. But we reject the FEC's contention that appellants' interpretation of the major purpose test is redundant because the statute already requires that an expenditure be "made for the purpose of influencing an election." A "major purpose" test was developed at least partly in order to construe this definition narrowly so as to avoid constitutional concerns. *See NCFI*, 469 F.2d 1135; *ACLU*, 366 F.Supp. 1041; *cf. Buckley*, 424 U.S. at 76-78, 96 S.Ct. at 662-63.

The FEC's interpretation of "political committee" would, as appellants point out, allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not. This would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of "political committee." That such an organization, as the Commission emphasizes, may be limited by other statutory provisions as well—*e.g.*, § 441b's prohibition on corporate expenditures and § 434(c)'s restrictions on persons (defined in § 431(11) to include corporations) making independent election expenditures—is irrelevant. There is no indication that Congress intended to limit one section in light of others or to make their application mutually exclusive. As the Commission concedes, various statutory provisions impose different, if overlapping, limits and requirements on organizations; these differences represent the sound exercise of congressional judgment as to the various degrees of risk to the election process posed by certain activities.

The FEC assumes that this statutory language already had a precise meaning—under the control of a candidate or made with the consent or authorization of a candidate—which in fact *NCFI*, 469 F.2d at 1141, and *Buckley*, 424 U.S. at 40-42, 79, 80, sought to impose. Appellants' major purpose test thus can be seen not as a tautology but as a necessary judicial gloss on the statutory definition of expenditure.

The Commission seeks to minimize the implications of its interpretation by arguing that it has not yet resolved when an organization's spending becomes "a" major purpose that counts toward the "political committee" threshold.[12] But we think little of this suggested safety valve; the inevitable logic of the Commission's test is that the two organizations described above, spending precisely the same amount to influence federal elections and therefore presenting precisely the same threat of election corruption, will be treated differently. And if the Commission is truly considering a variable major purpose standard as applied to contributions—now it applies and now it does not—such discretion in itself raises First Amendment concerns. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-33, 112 S.Ct. 2395, 2401-03, 120 L.Ed.2d 101 (1992)

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[12] The Commission nevertheless claims that it has consistently implemented its interpretation of the statute post-*Buckley*. The FEC points to two of its recent decisions, post-dating this litigation, to show its adherence to the major purpose test. *See* AO 1995-11, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6148-49 (1995); AO 1994-25, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6125. But as appellants note, earlier FEC advisory opinions—in the nearly 20 years after *Buckley* and 10 after *MCFL*—did not articulate a major purpose test; they instead appear to examine whether particular expenditures exceeded the $1,000 limit, without regard to the percentage of spending that was campaign related or to the organization's major purpose. *See, e.g.*, AO 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5426; AO 1988-22, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5932. We by no means think the FEC's apparent change of position dispositive, but it does undermine the Commission's insistence that the Supreme Court clearly imposed this test, particularly given its failure to explain that view in its Order in this case.

(First Amendment prohibits investing official in licensing scheme with discretion). Moreover, if it relied on such a standard, the Commission should have determined more precisely the level of AIPAC's campaign spending and should have explained why that funding was not "a" major purpose.[13]

There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made campaign contributions in excess of $1,000. Its decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of appellants' complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the complaint and remand to the FEC for further action not inconsistent with this opinion.

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[13] The FEC's decisions on how and to what extent to investigate a complaint, while reviewable, command substantial deference. *See FEC v. Rose*, 806 F.2d 1081, 1091 (D.C.Cir. 1986). However, the investigation here likely would have been insufficient to support a finding that AIPAC's contributions were not "a" major purpose. The Commission asserts in its brief, without citation to the record, that "the evidence indicated that AIPAC's campaign spending never even reached one percent of its annual budget," but that already approaches $100,000 (emphasis added). In any event, given our resolution of the case, the factual findings already made by the FEC indicate that AIPAC should be classified as a political committee.

* * * *

The judgment of the district court is

Reversed.

SENTELLE, Circuit Judge, dissenting, with whom Circuit Judge HENDERSON joins:

The standing doctrine "requires that anyone who would invoke the aid of the courts in resolving a complaint must allege, at a minimum, an actual or imminent injury personal to the plaintiff that is fairly traceable to the defendant's conduct and that is likely to be redressed by requested relief." *Louisiana Env. Action Network v. Browner*, 87 F.3d 1379, 1382 (D.C. Cir. 1996). For the reasons that follow, I would hold that appellants have not established these minimum requirements.

A. Informational Standing

When this matter was before the panel, I wrote for the majority finding standing based on "informational injuries." I concluded at the time, and believe now, that the panel was compelled by circuit precedent to reach that result. *See, e.g., Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 (D.C. Cir. 1987) (R.B. Ginsburg, J., concurring) (law of the circuit "'whether or not [it] is correct' . . . binds us unless and until overturned by the court en banc or by Higher Authority."). Because circuit precedent dictated that an organization can establish standing by alleging that a governmental action restricted the flow of information disseminated by the organization in its regular activities, *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 939 (D.C. Cir. 1986), I thought the panel had no choice on the issue. Because the en banc court is not so restricted but is

empowered to depart from circuit precedent, if I were writing for the majority today, I would take this occasion to modify circuit law on informational standing and would not find informational standing on the present record.

The majority, rightly, rejects informational standing for plaintiffs in this case. I applaud the majority's decision to treat the concept as a narrow one. I agree with the majority that a party cannot successfully claim informational standing where he cannot establish that "the government's failure to provide or cause others to provide" information "impinge[s] on the plaintiff's daily operations or make[s] normal operations infeasible. . . ." Maj. Op. at 735 (citing *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C. Cir. 1973)). While the majority is not clear on why appellants' complaint differs from that of, for example, the organization for the elderly in *Action Alliance*, it at least seems to be attempting to narrow the concept of informational standing by holding that the "[a]ppellants' alleged injury as voters does not seem to fit within the limited contours of" informational standing precedent. Maj. Op. at 736. But the majority retains the fundamental error which has infected our informational standing jurisprudence when it affords standing to the plaintiffs/appellants as voters, on a rationale indistinguishable from informational standing. Indeed, it recites in informational terms that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time bids

are due, would suffer a particularized injury even if all other bidders also suffered an injury." Maj. Op. at 737 (emphasis added). In setting forth this analysis, the majority admits that the class of "registered voters—even the more limited subset of those who actually vote—is a very large group of Americans. . . ."[1] *Id.* at 737. But the majority ducks the consequences of this admission.

The Supreme Court expressly held in *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Id.* at 499, 95 S.Ct. at 2205 (*citing, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). The majority has not explained why the claimed lack of information for the entire class of voters (or potential voters) does not fall squarely within this precept. The attempted distinction that " 'generalized grievance' does not just refer to the number of persons who are allegedly injured [but] refers to the diffuse and abstract nature of the injury," Maj. Op. at 737, gets nowhere without an explanation as to why this is not a diffuse and abstract injury.[2] The comparison to the bidder de-

[1] It is not at all clear why the injury is limited to the class of registered voters as opposed to all potential voters as the information, if useful, could be as likely to warrant registration and voting as voting in a particular direction.

[2] Contrary to the majority's assertion, Maj. Op. at 736 n.3, our logic does not suggest that a claim for information under FOIA is only a generalized grievance. FOIA gives everyone a right to information. A FOIA injury, therefore, is not a " 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205. It is a particularized injury personal to the disappointed requester, and *Warth*'s holding is therefore not implicated. Similarly, if the FEC had the information appellants want and refused to provide it, they might have a cognizable injury affording them standing.

prived of information accomplishes even less. Chief Justice Burger in *Schlesinger v. Reservists* made that comparison for us. "It is one thing for a court to hear an individual's complaint that certain specific government action will cause that person private competitive injury . . . but it is another matter to allow a citizen to call on the courts to resolve abstract questions." *Schlesinger*, 418 U.S. at 223, 94 S.Ct. at 2933 (footnote omitted). Cases in this second category, Chief Justice Burger noted, raise "only a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant." *Id.* This is the flaw of the new form of standing—voter standing—that the majority creates today. It, like the broad definition of informational standing, relies on a diffuse rather than a particularized injury.

I would not only reject informational standing as a basis for this claim, but, because I see no basis for distinction between this case and, for example, *Action Alliance*, I would reexamine the entire concept of informational standing as it now exists in this circuit, and I would reject it. I do not find within the majority opinion any justification for our precedent on that subject. The majority's creation violates the principle that a plaintiff generally may not rely for a claimed injury on a mere ideological interest, *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 112

(D.C. Cir. 1990), by perpetuating the notion that an organization has standing where the alleged injury is that the government's failure to provide information to the organization "impinge[s] on the plaintiff's daily operations or make[s] normal operations infeasible." Maj. Op. at 735 (*citing Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C. Cir. 1973)). While the Supreme Court's standing jurisprudence may not always be pellucid, the Court has left no doubt that "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S. Ct. 1361, 1368, 31 L.Ed.2d 636 (1972).

As the Court noted, if a special interest in a subject were enough to provide the floor for standing to a long-interested organization, there would be no objective basis for barring the same theory of standing to any other organization no matter how small or new, or to an individual with an interest in the subject matter. That the organization has made the collection and dissemination of information on a particular subject its goal in life no more gives it an injury in fact each time it cannot obtain the information it wants than would be true of any one of its members. The organization's standing can, like water, rise no higher than its members' source. That the organization cannot carry on its ordinary affairs because it cannot get the information it desires from the government no more creates injury in fact than if it were seeking government funds to which it was not

otherwise entitled because it could not operate its ordinary affairs without that funding. That could hardly be said to provide it with an injury in fact for standing purposes unless the government were under some duty to provide the funding. I see no reason why the same is not true with respect to information.

Informational standing, of course, has a legitimate origin in those areas of the law where Congress has created a right to information and an obligation on the government to furnish it, and a plaintiff, attempting to exercise that right, has been denied the same. As the majority rightly notes, "Congress may not 'create' an Article III injury that the federal judiciary would not recognize, [but] . . . Congress can create a legal right . . . the interference with which will create an Article III injury." Maj. Op. at 736 (citations omitted). Thus, under statutes such as FOIA, where Congress has expressly entitled citizens to certain information, the withholding of that information by the government violates that statutory right and causes the injury in fact which underlies standing. This is so despite the fact that all citizens hold the right equally and that generalized grievances do not provide the injury in fact necessary for Article III standing. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50, 109 S.Ct. 2558, 2564-65, 105 L.Ed.2d 377 (1989).

The logic of allowing that deprivation to constitute injury in fact despite the generalized nature of the right violated is, upon examination, inescapable. The right is generalized, but the injury is not. The injury has occurred specifically, individually, and palpably to the person who tried to exercise the right and was thwarted. If the generalized nature of a right were

sufficient to make the injury suffered in the deprivation of that right nonjusticiable, then there would be no way to vindicate, for example, First Amendment rights. Thus, standing under FOIA, under FACA, *see Public Citizen*, *supra*, and perhaps under the FECA is not "informational" standing at all. It is standing in its most traditional form. A plaintiff brings suit to vindicate an injury to a statutorily created right. That right happens to be access to information. But that type of action is not before us here. Plaintiffs in the instant case are not seeking to vindicate a statutorily created right.

The FEC is, as the majority makes clear, obligated under the Act to provide certain information to voters, indeed, to the population at large. If the plaintiffs had gone to the FEC seeking information that the Commission possessed and been denied it, and then jumped through the proper procedural hoops, the FEC could not credibly have argued that the plaintiffs did not have the injury in fact to make out standing. But that is not what happened. The plaintiffs did not seek access to information in the Commission's possession, but rather sought to have the Commission perform its alleged legal duty to regulate a third party—the American Israel Public Affairs Committee ("AIPAC")—in such a fashion as to cause the third party to give it the information to which the plaintiffs would then be entitled.

Although the Act contemplates citizen complaints initiating Commission investigation of violation of the Acts, 2 U.S.C. § 437g (1994), this is not to say that Congress has created a right to enforcement of the law, the violation of which constitutes an injury in fact for standing purposes. In *Heckler v. Chaney*,

470 U.S. 821, 831, 105 S. Ct. 1649, 1655, 84 L.Ed.2d 714 (1985), the Supreme Court reaffirmed "that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." That being the case, the Court recognized "the general unsuitability for judicial review of agency decisions to refuse enforcement." *Id.* For an injury to afford standing, it must be remediable in the action brought. As we cannot, under *Heckler*, afford a remedy for an injury consisting of no more than the generalized grievance that the Commission has failed to enforce the law, the Commission's failure to take the regulatory action of declaring AIPAC a political committee which would allegedly cause AIPAC to turn over the information to which appellants would then have access is not an injury which this court can remedy under *Heckler*.

Neither does the congressional provision affording a right to sue overcome the lack of standing. Granted, section 437g(a)(8)(A) permits any party aggrieved by the Commission's dismissal of a complaint or failure to act on such complaint to file a petition with the United States District Court for the District of Columbia. Such a statute creating a right to sue does not, however, create standing. At most, it invests a right to sue in those who otherwise have standing but would not necessarily have a clear claim to relief cognizable by a district court. The Supreme Court has clearly enunciated this concept in the analogous context of environmental litigation. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the Court of Appeals had held, *inter alia*, that the citizens [*sic*] suit provision in 16

U.S.C. § 1540(g) provided standing. *Lujan*, 504 U.S. at 572, 112 S.Ct. at 2142-43 (citing 901 F.2d at 121-22). In reversing that holding, the Supreme Court expressly rejected the view that "the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." 504 U.S. at 573, 112 S.Ct. at 2143. The Court recognized without difficulty that such a view rejected the consistent holding of the Supreme Court "that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy." *Id.* at 573-74, 112 S.Ct. at 2143. The logic of *Lujan* is no less applicable here. These plaintiffs have no statutory right, through section 437g or any other provision, to force the FEC to collect and turn over this information. In the absence of such a right, no injury—informational or otherwise—is possible. I would discard the entire notion of informational standing to the extent that it is something separate from traditional standing doctrine. Under traditional standing doctrine it is clear that these plaintiffs have stated no claim.

B. Redressability

Although I have alluded above to the absence of redressability as defeating standing, I wish to make it quite express that even if the grievance of voters is not held to be too generalized to afford standing, that grievance lacks the redressability essential to an Article III injury. Both we and the Supreme Court have repeatedly made it plain that where an injury to putative plaintiffs is "highly indirect" as to a governmental actor defendant, and " 'results from the

independent action of some third party not before the court,' " it is " 'substantially more difficult to meet the minimum requirement of Art. III' " standing than in the case of a direct injury. *Allen v. Wright*, 468 U.S. 737, 757-58, 104 S.Ct. 3315, 3328, 82 L.Ed.2d 556 (1984) (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin*, 422 U.S. at 505, 95 S.Ct. at 2208).

The *Allen* Court pronounced that analysis in a discussion that began with the causation element of standing, finding the line of causation between a grant of tax exemption and the third party's offending conduct "attenuated at best." *Id.* at 757, 104 S.Ct. at 3327-28. The Court then reasoned from that attenuated causation to a conclusion that "it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* at 758, 104 S.Ct. at 3328. The *Simon* decision makes it even more clear that multi-level relief is not only problematic as to causation—that is to say that the independent act of a third party is rarely fairly traceable to the government's failure to regulate—but also as to redressability. In that case, the Court held that "Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the Court." *Simon*, 426 U.S. at 41-42, 96 S.Ct. at 1926. In *Simon*, in *Allen v. Wright*, in *Fulani*, the high court and this one have repeatedly held that it is too speculative to meet the redressability requirement of Article III standing to

assume that an independent third-party actor would so amend its conduct to redress the wrong allegedly being done to the plaintiffs because of a court decree against the government. In those cases, admittedly, the regulatory act involved taxation. But the rationale is no different here.

In this case, no more than those, to find a lack of standing where redressability would depend on the Commission's regulation of a third party and that third party's response to the regulation is no "breathtaking attack on the legitimacy of virtually all judicial review of agency action," as the majority suggests. Maj. Op. at 738. Rather, it is only a specific application of general principles of standing jurisprudence.

Appellants' claim of redressability depends on the linked chain that the Commission will enter an order against AIPAC requiring the information plaintiffs seek, that AIPAC will comply with that order, and that appellants will still be sufficiently interested in the information thus produced that they will renew their claim on FEC to present them with that information after they jump through the procedural hoops. This, I submit, is too attenuated to provide the sort of redressability necessary to meet Article III standing.

CONCLUSION

Because the injury plaintiffs allege is neither personal to the plaintiffs nor redressable in this action, they lack standing to bring the claim to an Article III court. I would therefore affirm the grant of summary judgment entered by the district court.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 94-5088

JAMES E. AKINS, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, APPELLEE

[Argued May 10, 1995]
[Decided Sept. 29, 1995]
[As Amended Nov. 1, 1995]

OPINION

Before: EDWARDS, Chief Judge, SILBERMAN and SENTELLE, Circuit Judges.

Opinion concurring in part and dissenting in part filed by Circuit Judge SILBERMAN.

SENTELLE, Circuit Judge:

Appellants sought review in district court of the Federal Election Commission's dismissal of their administrative complaint alleging various violations of the Federal Election Campaign Act, 2 U.S.C. §§ 431-55 (1994). The district court granted summary

judgment for the Federal Election Commission. Because we agree that the Commission acted in a reasonable manner in its interpretation and application of the Federal Election Campaign Act as to the administrative complaint, we affirm.

I. BACKGROUND

James E. Akins, Richard Curtiss, Paul Findley, Robert J. Hanks, Andrew Killgore, and Orin Parker (collectively, "appellants") are former ambassadors, congressmen or government officials. They are politically active people who seek to influence policymakers and the public and who oppose the views of the American Israel Public Affairs Committee ("AIPAC") regarding United States foreign policy in the Middle East.

AIPAC is an incorporated, tax-exempt organization with approximately 50,000 supporters nationwide that lobbies Congress and the Executive Branch for military and economic aid to Israel. AIPAC has an annual budget of close to $10 million. AIPAC's stated purpose is to encourage close relations between the United States and Israel.

On January 9, 1989, appellants filed a complaint with the Federal Election Commission ("FEC" or "Commission"), the independent government agency responsible for enforcement of the Federal Election Campaign Act ("FECA" or "Act"), claiming that AIPAC was a political committee under 2 U.S.C. §§ 431(4) and 431(9)(A)(i) because it made expenditures, including contributions, aggregating in excess of $1,000 in a year for the purpose of influencing any election for federal office. As a political committee, AIPAC would be subject to registration and reporting

requirements involving disclosure of its donors and the amounts it had contributed to candidates, as well as the $1,000 limit for contributions to individual candidates. 2 U.S.C. §§ 433, 434(a)(1) and (b), 441a(1) and (2) (1994).

The FEC investigated the allegations and after a substantial investigation, the General Counsel issued a report regarding AIPAC's corporate expenditures, campaign-related activities and political activities. While the FEC found that AIPAC has made contributions that likely crossed the $1,000 threshold, it concluded that AIPAC is not a political committee under the statute because its campaign-related activities constitute only a small portion of its overall activities and are not AIPAC's major purpose. The FEC stated that AIPAC is primarily a lobbying organization interested in promoting U.S.-Israel relations and its campaign-related activities are undertaken as an adjunct to its lobbying efforts.

Adopting the General Counsel's recommendations, the Commission found that there was no probable cause to believe that AIPAC was a political committee in violation of the disclosure and reporting requirements of sections 433 and 434 of the Act. The Commission did find probable cause to believe that AIPAC violated section 441b, which restricts expenditures and contributions by corporations, but unanimously voted to take no action.

Appellants filed suit in district court claiming that the FEC's final agency action—its determination of no probable cause to believe that AIPAC was a political committee under the Act—was arbitrary, capricious and contrary to law. Appellants allege that the FEC's major purpose standard is contrary to law and

that the Commission's findings, reasons, and investigation were insufficient to support its conclusion that there is no probable cause to believe that AIPAC's campaign-related activities were at such a level as to make them a major purpose of the organization. The district court granted summary judgment on the basis that the FEC's construction and application of the major purpose standard was proper under the Supreme Court's and this Circuit's interpretations of the Act. The court found no evidence that the Commission failed to investigate adequately appellants' administrative complaint.

II. DISCUSSION

A. Standing

Before addressing appellants' claim on the merits, we must first resolve a jurisdictional issue: whether appellants have standing, both constitutional and prudential, to pursue their claims in federal court at all. In order to establish constitutional standing, appellants "must show injury in fact that is fairly traceable to the defendant's action and redressable by the relief requested." *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994) ("*ALDF*") (citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S.Ct. 752, 759-60, 70 L.Ed.2d 700 (1982)).

Section 437g(a)(1) of FECA allows any person who believes that there has been a violation of the Act to file a complaint with the FEC. In turn, section 437g(a)(8)(A) states that any party *aggrieved* by an order of the FEC dismissing its complaint may file a

petition with the U.S. District Court for the District of Columbia.

Appellants allege that the FEC's action has denied them their right as citizens, registered voters, and members of the public to obtain information that AIPAC as a political committee would be required to disclose. They contend that their ability to influence and inform policymakers and the public is impaired by the lack of information about AIPAC's contributors and expenditures.[1] While arguably an injury of this type would not appear to meet the requirements of Article III standing, a line of circuit precedent, beginning with a footnote in *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973), has recognized certain "informational injuries" resulting from agency action. *Id.* at 1087 n. 29 (finding appellants have standing to challenge AEC decision not to issue environmental impact statement because agency action limited appellants' ability to inform public about social issues and questions of public policy); *see also Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (finding organization adequately alleged informational injury in regulations restricting flow of information regarding services available to the elderly); *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83-85 (D.C. Cir. 1991) (assuming that Agriculture Department's failure to prepare impact statement with respect to germplasm program injured Foundation because its mission is to

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[1] Appellants have also alleged that their ability to compete in the political arena with AIPAC is weakened without the information. We do not recognize standing on that basis in this case.

provide information to its members and general public about such matters, but holding that appellants lacked standing on grounds that they failed to show particular agency action that triggered violation and caused injury). This court recently found informational injuries that satisfied the minimum requirements of Article III standing in *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720 (D.C. Cir. 1994) (finding constitutional standing, but dismissing case for lack of prudential standing); *ALDF*, 23 F.3d 496 (same). Although we acknowledge that this broad approach raises "complex and difficult considerations," *Lyng*, 943 F.2d at 84 (quoting *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1042 n. 6 (D.C. Cir. 1979)), circuit precedent compels that we find that appellants in this case meet the requirements of Article III standing with the informational injury they have alleged.

Appellants must also satisfy the prudential prerequisites of standing; they must show that they fall within the statute's "zone of interests" by demonstrating "either a congressional intent to protect or regulate the interest asserted, or some other indication that the litigant is a suitable party to pursue that interest in court." *ALDF*, 23 F.3d at 502 (citations omitted).

Given the broad purposes of FECA, appellants appear to meet this test. Two of the three purposes of the Act's disclosure requirements were intended to serve the information interests of the public, the electorate, and individual voters. These purposes were noted in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976):

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity . . . . A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

Id. at 66-67, 96 S.Ct. at 657 (footnotes omitted). Because appellants allege that they are voters and persons who seek to communicate to policymakers and the public about AIPAC's campaign contributions, their interest in information about campaign contributions falls within the "zone of interests" intended to be served by the statute. While arguably this interest is so generalized as to encroach upon the separation of powers concerns underlying Article III standing requirements, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78, 112 S.Ct. 2130, 2142-46, 119 L.Ed.2d 351 (1992), to reject standing on that basis would put us at odds with circuit precedent on informational injury as discussed above.

B. Standard of Review

The district court's grant of summary judgment is subject to *de novo* review. *Petersen v. Dole*, 956 F.2d 1219, 1221 (D.C. Cir. 1992). In conducting that review, we must determine anew whether the Commission's dismissal of the portion of appellants' administrative complaint alleging that AIPAC violated the Act by

failing to register and report as a political committee is "contrary to law." 2 U.S.C. § 437g(a)(8)(C). It is well settled that judicial review under this provision is limited. *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988). The Commission's dismissal of an administrative complaint cannot be disturbed unless it was based on "an impermissible interpretation of the Act" or was "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). *See also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44-45, 70 L.Ed.2d 23 (1981) ("*DSCC*").

Appellants bear the difficult burden of demonstrating that the Commission's interpretation was impermissible and contrary to law. The Commission must show only that its disposition of the administrative complaint was "sufficiently reasonable." *DSCC*, 454 U.S. at 39, 102 S.Ct. at 46 (citations omitted). Thus, the Commission's construction of its own statute cannot be disturbed if it is a permissible one. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Under this standard of review, the court will presume that the Commission's action was valid, even if the court would have interpreted the Act in a different manner. *See American Horse Protection Ass'n v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). Indeed, the Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37, 102 S.Ct. at 45. *Accord Common Cause*, 842 F.2d at 448 ("Deference is particularly appropriate in the context of the FECA. . . .").

C. Analysis

FECA defines a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A).[2] The Act limits contributions to political committees, 2 U.S.C. § 441a(a)(1)(C), and requires any organization that qualifies as a political committee to register with the Commission and file periodic reports of all its receipts and disbursements for disclosure to the public. 2 U.S.C. §§ 433 and 434.

The Act defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. . . ." 2 U.S.C. § 431(8)(A)(i). The definition of "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of

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[2] Section 431(4) also includes two other definitions of the term "political committee" not pertinent to this case:

> (B) any separate segregated fund established under the provisions of section 441b(b) of the title; or
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> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contribution aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

value made by any person for the purpose of influencing any election for Federal office. . . ." 2 U.S.C. § 431(9)(A)(i). An expenditure "for a communication expressly advocating the election or defeat of a clearly identified candidate" is a "contribution in kind" unless it is "not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate. . . ." 11 C.F.R. § 109.1(a), (c) (1995).

The debate in this case centers around the definition of "political committee" and the FEC's application of the major purpose standard. Appellants argue that the Act's language governing whether an organization making contributions is a political committee depends on a single quantitative standard: if its aggregate contributions are in excess of $1,000 in a calendar year. 2 U.S.C. § 431(4). They assert that because the statutory language is clear, the Commission's interpretation is not entitled to deference under *Chevron*. Appellants also argue that the major purpose test conflicts with the fundamental purposes of the Act, which are to prevent corruption and the appearance of corruption that arise when large contributions are given to secure a political *quid pro quo* from current and potential officeholders. *Buckley*, 424 U.S. at 26, 96 S.Ct. at 638.

We recognize that the Act has a broad definition of political committee; Congress intended to "address[ ] broadly the problem of political campaign financing," and wanted to "promote full disclosure of campaign-oriented spending" with FECA. *Id.* at 78, 96 S.Ct. at 663. The Commission, however, has construed the words "political committee" narrowly and applied a major purpose standard in determining whether

AIPAC was a political committee. Under this narrow interpretation, gleaned from case law, an organization is not a political committee unless, in addition to crossing the $1,000 threshold, it is under the control of a candidate or its major purpose is the nomination or election of a candidate. *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 n. 6, 107 S.Ct. 616, 624-25 n. 6, 93 L.Ed.2d 539 (1986). *Accord FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981). A more expansive definition would be constitutionally dangerous due to interference with "fundamental First Amendment interests." *Buckley*, 424 U.S. at 23, 96 S.Ct. at 636; *Machinists*, 655 F.2d at 392.

We agree with appellants that the statutory language is clear in that it broadly defines political committee in economic terms. But our inquiry does not end there. Rather, we must determine whether the Commission acted contrary to law by going beyond the text of the statute to narrow the definition of the term "political committee." To answer this question, we must look to case law interpreting the Act.

In *Buckley*, one of the plaintiffs' claims was that the reporting and disclosure provisions applicable to political committees were overbroad in their application to minor-party and independent candidates and in their extension to small contributions. 424 U.S. at 26, 96 S.Ct. at 638. The Court cautioned that the phrase "for the purpose of . . . influencing" an election or nomination in section 431's definition of "expenditure" could raise vagueness problems and "could be

interpreted to reach groups engaged purely in issue discussion." *Id.* at 79, 96 S.Ct. at 663. Noting that the lower courts had construed the term "political committee" more narrowly, the Court went on to state that to fulfill the purposes of the Act the term "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* It further noted that expenditures by political committees can be assumed to fall within the core area Congress sought to address because "[t]hey are, by definition, campaign related." *Id.*

Prior to *Buckley*, at least two lower courts were concerned with the Act's broad-based definition of political committee because it would likely include groups that were not meant to be subject to the restrictions of the Act. *See United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972) ("*NCFI*"); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973), *vacated on other grounds*, 422 U.S. 1030, 95 S.Ct. 2646, 45 L.Ed.2d 686 (1975).

In *NCFI* the Second Circuit considered whether a newspaper advertisement was an "expenditure," and whether the National Committee must be deemed a political committee. 469 F.2d at 1138. The court articulated a test that construed "the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates." *Id.* at 1141. It concluded that the advertisement was not an "expenditure," but noted that its interpretation of the phrase "for the purpose of influencing . . . [an] election" might make "enforcement of the Act . . .

somewhat more burdensome, as the supervisory officials will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." *Id.* at 1142. This test was later adopted by the United States District Court for the District of Columbia in *ACLU v. Jennings*, *supra*.

Appellants argue that the major purpose test set forth in *NCFI* and *Jennings* is the correct one because it centers on the major purpose of the *expenditure* as opposed to the purpose of the organization itself. We reject this argument for three reasons. First, it is inconsistent with the language in *NCFI* noting that "supervisory officials will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." 469 F.2d at 1142. Second, the statutory definition of "expenditure" includes the requirement that it be made "for the purpose of influencing any election for Federal office," 2 U.S.C. § 431(9)(A)(i), making the test that every expenditure have the major purpose of nomination or election of a candidate and rendering appellants' test a tautology. Third, Supreme Court precedent supports a conclusion that the focus is on the major purpose of the *organization*, rather than the major purpose of individual expenditures by an organization.

For example, in *Massachusetts Citizens*, the Supreme Court again mentioned the major purpose test while discussing whether a small-issue advocacy group could be considered a political committee. 479 U.S. at 262, 107 S.Ct. at 630. The Court found that although the group had made $10,000 in independent expenditures to influence federal elections, it had not violated the restriction on independent spending by

corporations contained in section 441b. The Court based its holding on three features of the citizens group, one of which was that its purpose was promoting political activities, not amassing capital.[3] *Id.* at 263-64, 107 S.Ct. at 630-31. The Court further noted that if the group's independent spending became "so extensive that the organization's major purpose may be regarded as campaign activity," then it would be classified as a political committee. *Id.* at 262, 107 S.Ct. at 630 (citing *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663).

This Circuit also adopted a narrow construction to determine whether a "draft group," that is, an organization that seeks to encourage a specific candidate to run for office, is a political committee under FECA. *See Machinists*, 655 F.2d at 394-96. In *Machinists*, we expressed concern about finding a fair reading of the statute that "comports with first amendment safeguards," and recognized the "grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a 'candidate' or directly related to promoting or defeating a clearly identified 'candidate' for federal office." *Id.* at 393. We declined to extend the term "political committee" to cover draft groups and noted that in doing so we would "avoid the constitutional problems which *Buckley* and its lower court predecessors were able to avoid by

[3] The Court also based its holding on the fact that the citizens group had no shareholders or other persons having a claim on its assets or earnings and that the group was not formed by a labor union or business corporation, and its policy was not to accept contributions from these entities. *Massachusetts Citizens*, 479 U.S. at 264, 107 S.Ct. at 631.

narrowly construing the term. . . ." *Id.* at 394. Because we found the Machinists Non-Partisan Political League's activities did not support an existing candidate, it was not a political committee under the Act. *Id.* at 396.

Appellants ask that we disregard both *Buckley* and *Massachusetts Citizens* as mere dicta. However, the scope of our inquiry is limited to the issue of whether the Commission's interpretation of the Act was contrary to law. Thus, even if the Court's discussion of the major purpose test in these decisions was dicta—and we do not necessarily agree—that would not make it an abuse of discretion for the Commission to follow this construction of the Act by the Supreme Court, particularly in light of our decision in *Machinists*. The Supreme Court's dicta may not bind federal courts and agencies, but an agency's reliance on dicta may nonetheless be reasonable. *See generally McCoy v. Massachusetts Inst. of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1939, 118 L.Ed.2d 545 (1992).

Although *Buckley* and *Massachusetts Citizens* concern expenditures under the Act, the Court's rationale concerning the constitutional implications of a broad application of the Act to expenditures applies equally to the Act's reach over contributions. A broader construction of "political committee" would likely require advocacy groups to disclose their contributors even though the group is not principally involved in advancing the election or defeat of a candidate. This could raise a First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170-71, 2 L.Ed.2d 1488 (1958). It is our duty in the interpretation of a federal

statute to avoid serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47, 73 S.Ct. 543, 546, 97 L.Ed. 770 (1953).

We find that it was reasonable for the Commission to follow the Court's and this Circuit's narrow interpretation of "political committee." Because a judicial gloss on the statute has limited the application of FECA's restrictions for political committees to groups whose major purpose is the nomination or election of a candidate, the FEC's interpretation of the major purpose test was not contrary to law.

Having established the validity of the Commission's major purpose test, we must next determine whether its application of that test and its determination that AIPAC is not a political committee under the Act was contrary to law. 2 U.S.C. § 437g(a)(8)(C). The Commission determined that AIPAC's campaign-related expenditures, while likely to have exceeded $1,000 in some years, were not its major purpose but were made as an adjunct to, and in support of, the lobbying efforts that were the organization's primary focus. The Commission correctly applied the major purpose test, the concern of which is the core purpose of the organization itself, not the individual expenditure or contribution. We are convinced that the Commission's determination was not so arbitrary or capricious to render it contrary to law.

Appellants' final and related argument is that the Commission's findings, reasons, and investigation were inadequate to support its conclusion that "only a small portion" of AIPAC's activities are campaign related. They assert that the inadequacy of the FEC's findings, reasons, and investigation preclude affirmance of the Commission's decision. In challenging the extent and techniques of the Commission's investigation, appellants are asking that we review the Commission's exercise of prosecutorial discretion, a sensitive matter within the Commission's expertise. *See Heckler v. Chaney*, 470 U.S. 821, 831, 105 S.Ct. 1649, 1655-56, 84 L.Ed.2d 714 (1985). We are mindful that "[i]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance directing where limited agency resources will be devoted. We are not here to run the agencies." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

Under FECA, the Commission enjoys a "broad grant of discretionary power in determining whether to investigate a claim or to bring a civil action. . . ." *Common Cause v. FEC*, 655 F.Supp. 619, 623 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988). A review of the General Counsel's report reveals that the Commission conducted a fairly extensive inquiry into appellants' claims, even if it was not as in-depth an investigation as appellants would have liked. The Act does not require the Commission to invoke any particular investigatory techniques, nor does it require the Commission to exhaust every last inquiry. Moreover, appellants suggest no specific areas that the FEC failed to investigate that would have undermined its determination. The Commission has broad discretion to decide whether further investment of resources is worthwhile, *Heckler*, 470 U.S. at 831, 105 S.Ct. at 1655-56, and we defer to its expertise regarding the direction and extent of the investigation. Based on all of the evidence, it was reasonable for the Commission to

conclude that campaign-related activities were not a major purpose of AIPAC. There is no evidence that the Commission failed to investigate adequately the administrative complaint.

III. CONCLUSION

The Commission's interpretation of the statute was permissible, its application of the interpretation was reasonable, and its underlying investigation was adequate. Thus, we are unable to find that the Commission's actions were "contrary to law" or arbitrary, capricious, or an abuse of discretion. The decision of the district court is therefore

Affirmed.

SILBERMAN, Circuit Judge, concurring in part and dissenting in part:

Although the FEC did not challenge appellants' standing, we were sufficiently troubled over our jurisdiction to ask the parties to submit supplemental briefs on the issue. I have come to the conclusion that my colleagues are correct that appellants have standing, but my analysis differs from the majority. I disagree with my colleagues on the merits.

I.

The dispute over standing turns entirely on whether appellants have established injury in fact. Appellants assert that they compete with AIPAC in lobbying Congress and seeking to persuade the American people on their views of American interests regarding Arab-Israeli disputes. Although appellants do not allege that they make political contributions, it is asserted that AIPAC's secret contributions to congressmen have disadvantaged appellants in this politi-

cal competition. Of course, many cases in both our court and the Supreme Court have recognized Article III injury when economic marketplace actors assert that a competitor has received a regulatory advantage. *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46, 91 S.Ct. 158, 159, 27 L.Ed.2d 179 (1970) (per curiam); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 805-12 (D.C. Cir. 1983), *cert. denied sub nom. Breen v. International Ladies' Garment Workers' Union*, 469 U.S. 820, 105 S.Ct. 93, 83 L.Ed.2d 39 (1984). We have not before now encountered a case in which the competition takes place in the political arena. I am mindful that a plaintiff may not rely for a claimed injury on a mere ideological interest, *see Competitive Enter. Inst. v. National Highway Traffic & Safety Admin.*, 901 F.2d 107, 112 (D.C. Cir. 1990), but I think appellants' case must be thought of as akin to one brought by an economic competitor, not to one brought by a litigant who can muster only an ideological interest.

The statute, by requiring any organization that makes or receives campaign contributions or expenditures aggregating over $1,000 per year to register as a political committee and meet certain reporting and disclosure requirements, has the clear purpose of leveling the playing field by reducing the value of campaign contributions and expenditures to both spender and recipient. Any campaign contribution or expenditure is worth less to give and receive if it must be disclosed. It is of less value to the spender because interests adverse to the spender will take notice, and the recipient may be politically pressured

to avoid any appearance of *quid pro quo* in policy positions. It is, at the same time, worth less to the recipient because undesirable publicity can be brought to bear on the transaction. And, in any event, the recipient's competitor will notice, and if the competitor should win the spender will not be among his favorite constituents. Essentially, then, a failure of the FEC to require an organization to disclose its contributions is equivalent to *adding* to the value of those contributions. Thus, a candidate running for office is certainly injured if his or her opponent, through the failure of the FEC to require disclosure, is enabled to receive secret contributions. It follows that individuals or organizations that can show that they are competing with the donor or spender on the other side of this political market are similarly injured if the FEC does not require disclosure. Appellants therefore have standing as competitors of AIPAC.

The FEC's primary argument against the application of this reasoning, which, to be sure, is only sketchily presented in appellants' complaint and supplementary brief, is that appellants only compete in the lobbying market with AIPAC, not in actual election campaigns. (AIPAC claims that it does not normally make campaign contributions, and it presumably will no longer do so given the FEC's finding of probable cause to believe that AIPAC violated § 441(b)). But, the lobbying "market" is intertwined with election competition. Many campaign contributors expect that if the candidate should win, he or she will be more inclined to listen to a contributor's views on proposed legislation than would be so if no contribution were made. In this very

case, the Commission found that AIPAC's "campaign-related activities and communications [were] undertaken as an adjunct to, and in support of, its lobbying efforts." AIPAC presumably will be a less effective lobbyist, and the congressmen to whom it contributed will be less likely to present AIPAC's position effectively (if they are so inclined), if AIPAC is required to disclose its contributions.

The Commission relies on *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), *cert. denied sub nom. Abortion Rights Mobilization, Inc. v. U.S. Catholic Conference*, 495 U.S. 918, 110 S.Ct. 1946, 109 L.Ed.2d 309 (1990), to support its argument that only direct competitors in the campaign election market would have standing to challenge its refusal to require AIPAC to register and disclose. In that case—a rather confusing one—the Second Circuit rejected a challenge brought by pro-choice advocacy groups to the Catholic Church's § 501(c)(3) status under the I.R.S. Code based on the church's illegal campaign expenditures. The court did note that the plaintiffs did not engage in election activity, but it seems clear to me that the case would not have come out differently even if the plaintiffs had been direct electioneering competitors of the church. The federal judiciary has rarely allowed one private party to challenge the tax status of another. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 40-41, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976). Furthermore, the general advocacy market in which both the church and the plaintiffs were competing is

so broad and amorphous as to defy measurement of plaintiffs' injury.[1]

The majority rests appellants' standing on what is sometimes referred to as informational standing—that appellants are injured by failing to receive information that the government should compel AIPAC to disclose. That approach is problematic here because recognition of informational standing in this case allows a generalized, undifferentiated interest in information to satisfy Article III requirements. "Informational injury" confers standing only in narrowly defined circumstances. It was first mentioned in a footnote in *Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086 n. 29 (D.C. Cir. 1973) (*SIPI*).[2] We recognized that the AEC's decision not to provide an impact statement on a reactor program established Article III injury because the Institute's main function was to distribute such information to the public. Similarly, we determined informational injury satisfied Article III

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[1] Of course, as the Commission indicates, the appellants are in one sense seeking a more severe sanction for AIPAC's illegal expenditures than the FEC determined was appropriate, but that does not undermine their standing. Under most statutes, this sort of action could not be brought because of *Heckler v. Chaney's* bar on judicial review of an agency's non-enforcement decision. 470 U.S. 821, 831, 105 S.Ct. 1649, 1655-56 (1985). But this statute squarely directs review of the Commission's determination. *See* § 437(g)(8)(c) ("In any proceeding under this paragraph the court may declare that the [FEC's] dismissal of the complaint or the failure to act is contrary to law.").

[2] The footnote was subsequently declared "unnecessary to the decision." *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 83 (D.C. Cir. 1991).

in *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937 (D.C. Cir. 1986), *vacated on other grounds*, 494 U.S. 1001, 110 S.Ct. 1329, 108 L.Ed.2d 469 (1990), where new government regulations restricting the availability of information on services for the elderly impaired AASC's ability to provide information, counseling and referral services for its members. By contrast, in *Competitive Enter. Inst.*, 901 F.2d at 122-23, the plaintiff organization lacked informational standing because it failed to show how the NHTSA's decision not to issue an EIS significantly diminished its ability to disseminate information or to continue its activities.

Two cases relied on by the majority to find informational standing are not determinative. In *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 84 (D.C. Cir. 1991), we only assumed that the organization's alleged injury—the Foundation's diminished ability to provide information to its members and the public due to the Agriculture Department's failure to prepare an EIS—was sufficient to confer informational standing without resolving the issue, because there was no prudential standing. We suggested, however, that informational injury alone is insufficient to establish Article III standing. We worried that a broad definition of informational standing would controvert the separation of powers principles enunciated in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), and would allow plaintiffs to manufacture standing every time an agency was not creating information a member of the public would like to have. *Lyng*, 943 F.2d at 84-85. And in *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 501 (D.C. Cir. 1994), the

decision merely asserted without discussion that Article III requirements were met by informational injury—the Fund's impaired ability to gather and disseminate information on laboratory conditions under the Agriculture Department's definition of "animal"—before going on to find no prudential standing.

Thus, under our precedent, "informational injury" satisfies Article III requirements only when the plaintiff is able to demonstrate an actual, concrete injury, that impinges on the plaintiff's daily operations or makes normal activities infeasible, and that is caused by the lack of access to particular information. To call appellants' injury an informational one is to accept their alternative claim that they are entitled to AIPAC's disclosures merely because they are members of the voting public. This sort of general interest cannot suffice to show Article III injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572, 112 S.Ct. 2130, 2142, 119 L.Ed.2d 351 (1992); *Sierra Club*, 405 U.S. at 739, 92 S.Ct. at 1369; *Allen v. Wright*, 468 U.S. 737, 760-61, 763, 104 S.Ct. 3315, 3329, 3331, 82 L.Ed.2d 556 (1984). If, instead, appellants' interest is thought more "particular" because of their political positions and their lobbying interests, then the claim of informational injury really reduces to the competitive injury claim. Thus, as I analyze appellants' injury, it is the Commission's failure to require AIPAC to disclose to the world its past campaign expenditures that disadvantages appellants—not appellants' inability to themselves gain that information.[3]

[3] Plaintiffs in this case clearly meet prudential standing requirements in that they are within the statutory "zone of interest." *See Clarke v. Securities Indus. Ass'n*, 479 U.S. at 394-99, 107 S.Ct. at 754-57; *Animal Legal Defense Fund*, 23 F.3d at 503. As the majority notes, FECA's purposes are broadly stated. But FECA's "zone of interest" cannot, as the FEC asserts, include only individuals' interests as *voters* and not individuals' interests as both *competitors* and *voters*. The logical implication of the FEC's argument is that prudential standing exists (as a "pure" voter) only where Article III standing is precluded (as a general interest under *Lujan*), so that no one would have standing. This result is absurd. Clearly a direct competitor of a political candidate, as the party most directly injured by improper campaign activities, is within the zone of interests intended to be protected by the statute. Thus, the statutory zone of interest is not limited to voters, but includes other political interests as well.

Moreover, FECA's broad language may in fact make a prudential standing inquiry irrelevant. If all voters are beneficiaries of the statute and are thus "aggrieved" within the meaning of § 437(g)(8), Article III always would impose a more restrictive standard, such that meeting Article III requirements alone would establish standing.

II.

Section 431(4)(A) defines "political committee" solely in terms of "expenditures" and "contributions": a political committee is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." "Contribution" is defined in turn by § 431(8)(A)(i) as "any gift, subscription, loan, advance, or deposit of money or anything of value, made by any person for the purpose of influencing any election." "Expenditure" is defined in similar terms by § 431(9)(A)(i) as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of

value, made by any person for the purpose of influencing any election."

The FEC tacitly concedes that the language of § 431(4)(A) is unambiguous and sets clear requirements for classification as a political committee, but asserts that the Supreme Court has narrowed the reach of the statutory language in response to First Amendment concerns. The FEC relies on language in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*), in claiming that an organization should only be classified as a political committee if—in addition to exceeding the $1,000 contribution or expenditure limits—the *organization's* major purpose is the nomination or election of a candidate or the organization is controlled by a political candidate, *i.e.*, the so-called major purpose test.[4] This interpretation of "political committee" is owed deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Appellants respond by asserting that the statutory language is clear, and that it has not been narrowed by the Supreme Court. Tracing the development of the term "major purpose," appellants argue that the test is properly employed to determine whether an

[4] This is apparently the first time the FEC has formulated this test; it has pointed to no Advisory Opinion that articulates either explicitly or implicitly a major purpose test, even 10 years after the Supreme Court cases on which it primarily relies—*Buckley*, 424 U.S. 1, 96 S.Ct. 612, and *MCFL*, 479 U.S. 238, 107 S.Ct. 616—supposedly imposed this test on the definition of political committee.

organization's independent disbursements constitute "expenditures" within the meaning of § 431(9)(A)(i), *i.e.*, whether they are "made . . . for the purpose of influencing any election," such that they count toward the $1,000 limit defining political committee status. *Buckley* and *MCFL* endorse this test; any references to the major purpose of an organization, rather than an expenditure, merely establish the presumption that the expenditures of an organization the major purpose of which is election activity will fall within the statutory definition. Further, *MCFL* noted that independent expenditures raise more serious First Amendment concerns and therefore require more compelling justification for government restrictions, than do contributions like those made by AIPAC here. Appellants point out that the FEC's major purpose test has the anomalous result of allowing large organizations that spend only a small portion of their budgets on direct campaign contributions to avoid the requirements placed on political committees, undermining FECA's emphasis on disclosure as a means of curbing the threat or appearance of election abuse.

The FEC's assertion that its interpretation of "political committee" is entitled to deference is simply wrong. It is undisputed that the statutory *language* is not in issue, but only the gloss put on this language by Supreme Court decisions. We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other case. Appellants thus do not bear "the difficult burden of demonstrating that the Commission's interpretation was impermissible and contrary to law," Maj.Op. at 352; they need only show that their inter-

pretation better reflects the statutory language and purpose, as interpreted by the Supreme Court, than does the FEC's.

While there is language in *Buckley* and *MCFL* that can literally be read to support the FEC's position, both cases focused on the constitutional concerns raised by *independent expenditures*. Independent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the goal of preventing election corruption. *Buckley*, 424 U.S. at 19-23, 78-81, 96 S.Ct. at 635-37, 663-64; *MCFL*, 479 U.S. at 259-60, 107 S.Ct. at 628-29. They raise graver First Amendment concerns because it is difficult to determine when an expenditure is independent—rather than coordinated with or by a particular candidate—and regulation therefore risks chilling protected speech.

Thus, in *Buckley* the Supreme Court determined that expenditure limits are more likely to violate the First Amendment because they place substantial and direct restrictions on the ability to engage in political speech. *See Buckley*, 424 U.S. at 39-59, 96 S.Ct. at 654. Contribution limitations, on the other hand, raise fewer constitutional concerns, it was thought, because they serve the basic governmental interest of protecting the electoral process *without* restricting political debate and discussion. *See id.* at 28, 96 S.Ct. at 639 (such limits "focus[ ] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified"); *see also id.* at 23-38, 96 S.Ct. at 636-44. To support its major purpose test, the FEC relies on the Court's

discussion of § 434(e), which imposes disclosure requirements on "[e]very person" making contributions or expenditures exceeding $100.[5] The Court rejected the claim that § 434(e) imposed burdens that would deter individuals "from making expenditures for their independent political speech." *See id.* at 74-75, 96 S.Ct. at 661. It was determined that "contributions"—when defined as direct or indirect contributions to a candidate, political party, or campaign committee, or expenditures placed with the cooperation or consent of a candidate—"have a sufficiently close relationship to the goals of the Act," and therefore limits on them are constitutional. *Id.* at 76, 96 S.Ct. at 662. The Court noted that the meaning of "expenditure," however, posed line-drawing difficulties because it created the danger of "encompassing both issue discussion and advocacy of a political result." *Id.* at 77, 96 S.Ct. at 662. Therefore, the reach of § 434(e) was limited by "construe[ing] 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80, 96 S.Ct. at 664. Coming in the midst of its analysis of the scope of "expenditures," the Court's language that apparently refers to the major purpose of an organization is at best ambiguous:

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[5] Section 434(e) has subsequently been amended and is now § 434(c): "Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year" shall be subject to certain reporting and disclosure requirements. 2 U.S.C. § 434(c) (West 1985 & Supp.1995).

> To fulfill the purposes of FECA [political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. *Expenditures* of candidates and of "political committees" *so construed* can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79, 96 S.Ct. at 663 (emphasis added).[6] When parsed carefully, this wording does not support the FEC's major purpose test for "political committee" status as applied to contributions. Perhaps the best interpretation of this language is that an *organization* controlled by a candidate or the major purpose of which is election-related will presumptively have *expenditures* falling within the statutory definition. In any event, the Court clearly distinguished *expenditures* and *contributions* and referred to a "major purpose" test only with regard to the former.

While certain language in *MCFL* can also be read to support the FEC's position, the Court was again addressing First Amendment problems with the regulation of *independent expenditures*. The Court held

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[6] *Buckley* cited both *United States v. National Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) and *American Civil Liberties Union, Inc. v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union, Inc.*, 422 U.S. 1030, 95 S.Ct. 2646, 45 L.Ed.2d 686 (1975), as developing this "major purpose" test. These two cases applied a "major purpose" test to determine whether a particular disbursement was "made . . . for the purpose of influencing any election" under § 431(9)(A)(i).

that § 441(b), which prohibits corporate contributions or expenditures "in connection with any election," was unconstitutional as applied to MCFL, a non-profit advocacy group that had made independent expenditures violating § 441(b). The Court's concern was that the reporting and disclosure requirements of FECA might discourage protected political speech of advocacy groups. *See id.*, 479 U.S. at 253-56, 107 S.Ct. at 625-27. While *MCFL*'s references to the major purpose of an organization may thus have relevance for the issue of when *independent expenditures* suffice to establish political committee status, *MCFL* does not control cases involving contributions or coordinated spending. The Court's analysis clearly distinguishes contributions and expenditures: "should MCFL's *independent spending* become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262, 107 S.Ct. at 630 (quoting *Buckley*, 424 U.S. at 79, 96 S.Ct. at 663) (emphasis added).[7] As in *Buckley*, this language can plausibly be read as merely creating a presumption that certain organization's expenditures are "made . . . for the purpose of influencing any election." Also as in *Buckley*, the underlying concern is that congressional regulation, in its effort to achieve full disclosure, may impermissibly discourage protected independent expenditures.

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[7] Of the Court's two references to a major purpose test, the first was joined by only a plurality of Justices. The second, quoted here, was joined by Justice O'Connor, whose concurrence emphasized that *Buckley* still applied and that disclosure requirements for independent expenditures were generally valid. *Id.*, 479 U.S. at 265-66, 107 S.Ct. at 631-32.

In short, the Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case. There is no longer a constitutional problem with applying § 431(4)(A) to AIPAC or to other organizations making campaign *contributions* exceeding the statutory limits.

The FEC's conception of the major purpose test does not make this distinction between expenditures and contributions, and it therefore imposes an unduly narrow definition of "political committee."[8] It allows a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. This ignores the $1,000 limit in § 431(4)(A)'s definition of

[8] Contrary to the FEC's assertion, we did not endorse its "major purpose" test in *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 397, 70 L.Ed.2d 213 (1981). In *Machinists*, we held that "draft groups" that promoted the acceptance of particular individuals prior to their actual nomination did not fall within § 441(a)'s definition of political committee because the expenditures and contributions were not made to a "candidate." *Id.* at 296. While our language suggested that it is not the "purpose" of the organization itself but of its disbursement (its "activities") that is relevant to determining whether a group is a political committee, our decision was based on Congress' expressed intent to exclude draft groups from the definition of political committee. *See id.* at 394-96.

"political committee," even in the absence of significant First Amendment concerns with regulating contributions. Moreover, that such an organization may be limited by other provisions of FECA as well is irrelevant. There is no indication that Congress intended to limit one section in light of others or to make their application mutually exclusive. Various provisions impose different, if overlapping, limits and requirements on organizations; these differences represent the sound exercise of congressional judgment as to the various degrees of risk to the election process posed by certain activities. While the FEC's "major purpose" test may therefore be valid in determining whether an organization making independent expenditures is subject to the requirements imposed on "political committees," it cannot legitimately be used to place contributions exceeding $1,000 outside the scope of § 431(4)(A)'s definition of "political committee."

There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made direct campaign contributions in excess of $1,000. The FEC's decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of appellants' complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the complaint and remand to the FEC for further consideration—and if necessary further

investigation[9]—of AIPAC's status. I respectfully dissent.

[9] Appellants alternatively claimed that the FEC's investigation was inadequate. The FEC's decisions on how and to what extent to investigate, while reviewable, command substantial deference. *Cf. Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (judicial review particularly circumscribed in area of prosecutorial discretion); *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1091 (D.C.Cir.1986) (courts have limited role in supervising agency use of limited resources). And the statute imposes no particular investigatory techniques or obligations. Here, even though appellants note several leads that the FEC could have pursued more vigorously, the investigation probably passes the minimal level of sufficiency. To require a full-blown court examination of each investigatory decision would intrude too deeply into the FEC's proper area of authority. Moreover, under the circumstances of this case, the factual findings already made by the FEC indicate that AIPAC should be classified as a political committee.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 94-5088

JAMES E. AKINS, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

[Jan. 25, 1996]

ORDER

Prior report: 66 F.3d 348

Before: EDWARDS, Chief Judge; WALD, SILBERMAN BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS and TATEL, Circuit Judges.

PER CURIAM.

Upon consideration of appellants' suggestion for rehearing *in banc* and of the response thereto, it is

ORDERED, by the Court *in banc*, that the suggestion is granted. This case will be considered and decided by the court sitting *in banc* on both the standing and statutory construction issues. It is

FURTHER ORDERED, by the Court *in banc*, that the judgment filed herein on September 29, 1995 is hereby vacated.

A future order will govern further proceedings.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1864 (JLG)

JAMES E. AKINS, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

Filed: [Mar. 30, 1994]

OPINION

This matter is before the Court on cross-motions for summary judgment, pursuant to Federal Rule of Civil Procedure 56(a). The Court has considered the filings, the arguments presented by counsel at the hearing on the motion, the record and the relevant case law. For the reasons set forth below the Court grants defendant's Motion for Summary Judgment and denies plaintiffs' Motion for Summary Judgment.

I. Background

a. Parties

The plaintiffs in this case are six individuals who were former ambassadors, congressmen or government officials. They are politically active people who oppose the views of the American Israel Public Affairs Committee ("AIPAC"), regarding U.S. for-

eign policy in the Middle East. The plaintiffs compete with AIPAC in an effort to influence the opinions and actions of members of Congress, the executive branch and the public.

The defendant, Federal Election Commission ("FEC" or "Commission"), is the independent government agency responsible for enforcement of the Federal Election Campaign Act, ("FECA" or "Act"), 2 U.S.C. §§ 431-455 (1981).

The American Israel Public Affairs Committee ("AIPAC") is not a party in the case, although the Court granted it leave to file as *amicus curiae*.[1] AIPAC is an incorporated, tax-exempt lobbying organization with approximately 50,000 supporters. AIPAC's function is to encourage close United States-Israel relations and to provide services to its supporters. Administrative Record at 1469 (hereinafter "A.R. at ."). "AIPAC's stated purpose has been to 'conduct public action with a view to maintaining and improving the friendship and goodwill between the United States and Israel.'" *Id.*

b. The Administrative Complaint

On January 9, 1989, plaintiffs filed an administrative complaint with the FEC, designated as Matter Under Review ("MUR") No. 2804, against AIPAC and twenty-seven political action committees. *See*, 2 U.S.C. § 437g(a)(1). The complaint advanced four arguments:

1) AIPAC is a political committee as defined by the Federal Election Campaign Act, because it is a

[1] AIPAC filed a brief that addressed issues unrelated to plaintiffs' complaint; therefore, the Court struck the pleading by Memorandum and Order dated December 8, 1993.

"club, association, or other group of persons which makes expenditures aggregating in excess of $1000 during the calendar year..." 2 U.S.C. §431(4)A. As a political committee, AIPAC is required to register with the Commission. 2 U.S.C. § 433. And, AIPAC must adhere to the reporting requirements established by the FECA. 2 U.S.C. § 434.

2) AIPAC and the twenty-seven political committees are affiliated and therefore, are required to file a statement of affiliation with the FEC. 2 U.S.C. § 441a(a)(5). Under the Act, all contributions made by affiliated committees are treated as though they were made by a single committee, therefore affiliated committees are subject to expenditure limitations of 2 U.S.C. § 441a(a) (2) (A).

3) AIPAC improperly failed to disclose its election-related activity to the FEC.

4) AIPAC made illegal campaign expenditures.

Based upon two reports generated by the General Counsel, the FEC issued two certificates of agency action which closed the case.

On November 29, 1989, the General Counsel recommended that the FEC find "no reason to believe" that AIPAC and the twenty-seven political committees were in violation of 2 U.S.C. § 441a(a)(5) by reason of affiliation. *See*, A.R. at 2515-2516, General Counsel's Report, November 29, 1989. Because the Commission determined that AIPAC and the twenty-seven political committees were not affiliated, they were not in violation of spending limitations imposed by 2 U.S.C.

§ 441a(a)(2)(A). *See*, A.R. at 2675-2678, FEC's Certification, December 20, 1989.

After an extensive investigation, the General Counsel issued a report regarding AIPAC's corporate expenditures, campaign-related activities and political activities. *See*, A.R. at 3671-3778, General Counsel's Report, January 30, 1992. The General Counsel recommended that the Commission find no probable cause to believe AIPAC violated 2 U.S.C. § 433 and 434; and find probable cause to believe AIPAC violated 2 U.S.C. § 441b.

By a certification signed on June 16, 1992, and issued on June 17, 1992, the Commission adopted the General Counsel's recommendations. A.R. at 3871-3872, FEC Certification, June 16, 1992. First, the FEC found no probable cause to believe that AIPAC was a political committee in violation of 2 U.S.C. §§ 433 and 434. Second, the Commission found probable cause to believe that AIPAC violated 2 U.S.C. § 441b "by making contributions to or expenditures on behalf of federal candidates in the form of communications to a group of persons that AIPAC considered members." A.R. at 3924, "Statement of Reasons," July 27, 1992. Although the FEC found AIPAC to be in violation of 2 U.S.C. § 441b, the Commission exercised its prosecutorial discretion pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985), and took no action with respect to the violation. By unanimous vote, the Commission closed the file on June 16, 1992. A.R. at 3872.

c. District Court Complaint

Pursuant to 2 U.S.C. § 437g(8) (A), plaintiffs filed a Complaint before this Court on August 12, 1992. In the Original Complaint, plaintiffs sought judicial review of the FEC's final adjudication which dismissed their administrative complaint. Plaintiffs urged the Court to impose declaratory and injunctive relief against the FEC for failure to enforce the Federal Election Campaign Act in the disposition of their administrative complaint against AIPAC and the twenty-seven political committees. Plaintiffs filed a Motion for Leave to File First Amended Complaint on December 21, 1992. The Court granted plaintiffs' Motion for Leave to File First Amended Complaint and the case was narrowed to one cause of action. *See*, Memorandum & Order filed August 11, 1993.

The remaining issue before the Court is whether or not the FEC's final agency action—which determined that AIPAC is not a "political committee" as defined by 2 U.S.C. § 431(4)A of the Federal Election Campaign Act and therefore, is not subject to the registration and reporting requirements of 2 U.S.C. §§ 433 and 434—was arbitrary, capricious and contrary to law. Plaintiffs ask the Court to declare contrary to law the FEC's June 16, 1992 decision finding "no probable cause to believe" that AIPAC is a "political committee" as defined by 2 U.S.C. § 431(4)A. They urge the Court to remand this matter to the FEC and order the agency to revisit the question. *See*, Amended Complaint, at 14, filed December 21, 1992.

Plaintiffs argue four alternative grounds whereby the Court should enter summary judgment in their favor. Plaintiff's first three arguments attack the Commission's conclusion "that AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities . . . constitute only a small portion of its overall activities and does not appear to be its major purpose." A.R. at 3772, General Counsel's Report, January 30, 1992. Plain-

tiffs argue that the Commission's "major purpose" standard:

1. is contrary to law;

2. departs without explanation from the agency's precedents;

3. is unclear; and the FEC's decision under the major purpose standard is not supported by sufficient findings and reasons.

In addition, plaintiffs contend that the Commission failed to conduct an adequate investigation of AIPAC's political activities.

The FEC challenges the plaintiffs' arguments by showing that the Commission's interpretations of the meaning of "political committee" under the Act and the "major purpose" standard as defined by *Buckley v. Valeo*, 424 U.S. 1 (1972), are proper. Furthermore, the FEC urges the Court to recognize the Commission's broad discretion in interpreting the Federal Election Campaign Act and find that the application of the "major purpose" standard to AIPAC and the facts of this case was precise. The FEC also argued that its investigation into AIPAC's expenditures and activities was wholly adequate. Defendant contends that the depth of the agency's investigation is within the exclusive arena of the FEC's prosecutorial discretion and deference to the agency "should be presumptively afforded." *Orloski v. FEC*, 795 F.2d 156, 164 (D.C.Cir. 1986) (citation omitted).

II. Legal Standard

a. "Political Committee" as defined by the Federal Election Campaign Act

A "political committee" is "any group of persons which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4). An "expenditure" is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9) (A) (i). An expenditure is a "contribution" if it is made "with the cooperation or with the prior consent of, or in consultation with or at the request of suggestion of, a candidate." 11 C.F.R. § 109.1.

"When an organization qualifies as a political committee, pursuant to 2 U.S.C. § 431(4), the organization must register and file periodic reports of its receipts and disbursements with the Commission." A.R. at 2745; *See* 2 U.S.C. §§ 433 and 434. The reports must identify each individual who gives or receives from the political committee more than $200. *See* 2 U.S.C. § 434(b)(3)(A). Political committees are prohibited from contributing more than $1000 to any candidate, except that multicandidate political committees may contribute up to $5000. *See*, 2 U.S.C. § 441a(a). And, corporations are prohibited from making any contributions or expenditures "in connection with any election to any political office." 2 U.S.C. § 441b(a).

b. The "major purpose standard"

The classification of a group as a "political committee" is triggered by the amount of money it expends "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). An expendi-

ture in excess of $1000 activates the registration and reporting requirements of this Act. *See* 2 U.S.C. § 431(d). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court acknowledged the problem of applying this broad, vague definition to different kinds of groups involved in the political process. The Court cautioned that the definition of political committee "could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. Subjecting issue groups to the restrictions of the Act, would fly in the face of its primary purpose, which is to "limit spending in federal election campaigns and to limit pernicious influence over candidates ... that wealthy individuals or corporations could achieve by financing the political war chests of those candidates." *Orloski*, 795 F.2d at 163 (citation omitted).

In *Buckley*, the Supreme Court acknowledged the efforts of the lower courts to "construe[] the words 'political committee' more narrowly." 424 U.S. at 79; *See, United States v. National Committee for Impeachment*, 409 F.2d 1135, 1141 (2nd Cir.1972); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041, 1057 (D.D.C. 1973). The *Buckley* Court fashioned its own definition—"To fulfill the purposes of the Act they [political committees] need only encompass organizations that are under the control of a candidate or **the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79** (emphasis added). "The narrowing construction given to the words 'political committee' by the lower courts which was endorsed in *Buckley*," has been used to determine whether or not organizations are "political committees" under the FECA. *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C.Cir. 1981).

c. Standard of Review

A provision of the FECA allows parties to seek judicial review if the Commission dismisses a complaint or fails to act on a complaint filed within 120 days. *See* 2 U.S.C. § 437g(8)(A). The Court's task is to determine if the Commission's action was contrary to law. *See* 2 U.S.C. § 437g(8)(C). In *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981), the Supreme Court disagreed with the lower court's conclusion "that the Commission's construction of the Act was entitled to no deference whatsoever." 454 U.S. at 36-37. The Court acknowledged that "deference should presumptively be afforded" to the Commission. *Id.* at 37. In support of this conclusion, the Court highlighted Congress's intent to give the FEC administrative and enforcement responsibility, rulemaking and adjudicative powers, and power to make general policy decisions regarding the administration of the Act. *Id.*

In order for plaintiffs to prevail, they must show that the Commission acted in contravention of the Act. Plaintiffs carry the difficult burden of convincing the court that the Commission's interpretation of the Act was impermissible and contrary to law. Conversely, the defendant must show that the disposition of the administrative complaint by the agency was "sufficiently reasonable." *Id.* at 39. Because the standard of review is "highly deferential," the Court will presume that the agency action is valid, even if the Court would have interpreted the Act in a different manner. *See American Horse Protection Association, Inc. v. Yeutter*, 917 F.2d 594 (D.C. Cir. 1990). Therefore, the Court will examine the FEC's disposition of plaintiffs' administrative

complaint to determine if the Commission acted contrary to law when it found no probable cause to believe that AIPAC was a political committee within the meaning of the Act. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

III. Discussion

First, plaintiffs urge the Court to find that the defendant acted contrary to law in the disposition of the administrative complaint. Plaintiffs direct the Court to the "unambiguous language of the statute" and they argue that only the textual definition of political committee applies to the facts of this case. Plaintiffs' argument is based upon a single quantitative standard: if a group makes a contribution of [1000] $100 or more, that group is a political committee. *See* 2 U.S.C. § 431(4). Plaintiffs implore the Court to find the Commission's interpretation invalid, because the record shows that AIPAC's contributions were in excess of $1000.

As the Supreme Court made clear in *Buckley* and its progeny, the definition of "political committee" had to be narrowed to protect the constitutionality of the Act. Without the narrowing construction, the exercise of First Amendment rights, particularly the right of associational privacy, *NAACP v. Alabama*, 357 U.S. 449 (1958), was threatened. *See Buckley* 424 U.S. at 66. Therefore, this Court must consider the narrowing construction upon evaluating the statute and the Commission's interpretation of the statute.

Plaintiffs' argument that the Court should only look to the unambiguous text of the Act is inappropriate here. The Court must look beyond the statute to the case law in order to determine whether or not

AIPAC is a political committee under the FECA. Accordingly, the Court finds that plaintiffs' first argument fails to show that the Commission acted contrary to law because it went beyond the statute to narrow the textual definition of "political committee."

Second, plaintiffs argue that the Commission's application of the major purpose test is improper. Specifically, plaintiffs assert that not only is the Commission's application of the major purpose test unclear and insupportable, but it also departed from prior agency precedent without explanation. The plaintiffs argue that the major purpose of an organization's independent expenditures must be examined, as opposed to the major purpose of the organization itself.

The major dispute between the parties relates to the definition of political committee and the application of the major purpose standard. Congress intended to "address broadly the problem of political campaign financing," and wanted to "promote full disclosure of campaign-oriented spending" with the FECA. *Buckley*, 424 U.S. at 78. While the judiciary was in accord with this goal, the *Buckley* Court made clear that the Act was not contemplated "to reach groups engaged purely in issue discussion." *Id.* at 79. The courts had been concerned with the Act's broad, economic-based definition of political committee, because it is likely to include groups that were not meant to be subject to the restrictions of the Act.

Several early election law cases, including *Buckley*, were troubled by the Act's impact upon First Amendment issues. For example, some issue-oriented groups might be silenced by the burdensome requirements of the FECA at the same time that campaign-related groups were being regulated prop-

erly under the FECA. *See, e.g., United States v. National Committee for Impeachment*, 409 F.2d 1135 (2nd Cir. 1972) ("NCIF"); *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973).

In an effort to protect the First Amendment rights of many groups that would come under the restrictions of the Act, the courts narrowed the definition of political committee, with the "major purpose" standard. This test was first articulated by the Second Circuit in *NCIF* and was later adopted by the United States District Court for the District of Columbia in *ACLU v. Jennings*. It reads as follows: "We also construe the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates." *NCIF*, 469 F.2d at 1141. The Court acknowledged that "under this interpretation, enforcement of the Act may be made somewhat more burdensome, as the supervisory officials will be forced to glean the principal **or major purpose of the organizations** they seek to have comply with the Act." *Id.* at 1142 (emphasis added).

In their pleadings and at oral argument, plaintiffs argued that the major purpose test set forth in *NCIF* and *Jennings* focused on the major purpose of the expenditure, instead of the major purpose of the organization. They go on to assert that *Buckley* did not overrule those cases, and therefore, the analysis is still good law today. Plaintiffs accuse defendant of improperly applying this "major purpose" standard to AIPAC, the organization, as opposed to the expenditures made by AIPAC. Plaintiffs argue that this application of the major purpose standard is contrary to law.

Defendants argue that the major purpose standard as set forth in *Buckley* is clear: that the Supreme Court contemplated an analysis of the organization's major purpose, not the expenditure's major purpose. The Commission supports its assertions with recent and persuasive case law. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("MCFL"); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C.Cir. 1981). In *MCFL*, the Supreme Court determined that a corporation's independent spending could not be subject to the restrictions of 2 U.S.C. § 441b if the corporation was formed for the express purpose of promoting political ideas, did not have shareholders, and was not established by a corporation or labor union. 479 U.S. at 264. The Supreme Court also made clear that if an organization's independent spending became so extensive that **the organization's major purpose** may be regarded as campaign activity, then it would be classified as political committee. *MCFL*, 479 U.S. at 262. (emphasis added). Defendant urges the Court to find that the Commission's consideration of AIPAC's major purpose—as an organization—was proper, according to Supreme Court precedent as set forth in *Buckley* and *MCFL*.

This Circuit applied the major purpose test to determine whether a "draft group", that is, an organization that seeks to encourage a specific candidate to run for office, is a political committee under the FECA. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C.Cir 1981). The court attempted, like those in *NCIF*, *Jennings* and *Buckley*, "to find a fair reading of the statute with comports with first amendment safeguards." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d at 393.

In *Machinists*, the court recognized the "grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a 'candidate' or directly related to promoting or defeating a clearly identified 'candidate' for Federal office." *Id.*

The court acknowledged that if the activities of an organization were "under the control of a candidate" or were "directly related to promoting or defeating" a candidate, then that organization would be a political committee under the FECA. The court held that the Machinists Non-Partisan Political League was not a political committee under the Act, because the group activities "did not support an existing 'candidate'." *Id.* at 396. The major purpose of the organization was to draft candidates, not to advance the election or defeat of a particular candidate for Federal office.

The plaintiffs' assertion that the case law requires this Court to examine the major purpose of an organization's expenditures to determine if that organization is a political committee appears to be supported by the *NCIF* case. In *NCIF* the court "construe[d] the Act to apply only to committees soliciting contributions or **making expenditures the major purpose of which is the nomination or election of candidates.**" 469 F.2d at 1141. (emphasis added). But, the court went on to reflect upon the ramifications of the major purpose test, and acknowledged that the major purpose test will be burdensome on the administrators of the Act, because they "will be forced to **glean the principal or major purpose of the organizations** they seek to have comply with the Act." *Id.* at 1142. (emphasis added). It is clear from the language of *NCIF*, and the case law that interpreted the "major purpose" test thereafter, that the test applies to the

organizations which may be subject to the reporting and disclosure requirements of the FECA, and not to the expenditures made by them.

The Court finds that the "major purpose" test as first articulated by the Second Circuit, and endorsed by the Supreme Court in *Buckley* was interpreted properly by the defendant FEC. The plaintiffs' assertion that the case law requires the Court to examine the major purpose of an organization's expenditure to determine if that organization is a political committee is erroneous. Under these circumstances, the Court must defer to the agency action and uphold the commission's analysis and application of the Act.

The Court's next step is to determine whether or not the Commission's application of the major purpose test, and its determination that AIPAC is not a political committee under the FECA was contrary to law. The FEC implemented an extensive investigation, and developed a substantial administrative record which documents AIPAC's political interests, finances and campaign-related activities. AIPAC was incorporated in 1963, as a non-profit organization. A.R. at 1469. Its sole function, as a registered domestic lobby, is to encourage close U.S.-Israel relations and to provide service to its own members. *Id.*

The Commission made the determination that "AIPAC's campaign-related expenditures, while likely to have exceeded $1,000 in some years, were not its major purpose but were made as an adjunct to, and in support of, the lobbying efforts that were the organization's primary focus." A.R. at 3772. Accordingly, the Commission found no probable cause to believe that AIPAC was in violation of sections 433 and 434 of the FECA. A.R. at 3871-3872.

The Court has reviewed the administrative record, and the legal arguments presented by the parties. The Court finds that the Commission interpreted properly the statutory definition of "political committee" and the "major purpose" test. The Court is convinced that the Commission's application of the major purpose test to the facts presented in the administrative complaint, regarding AIPAC's campaign-related activities was reasonable. The Court is mindful of the deference which should presumptively be afforded to this agency. *See Orloski* at 164.

In their last argument, plaintiffs attempt to show that the Commission failed to conduct an adequate inquiry or investigation into the facts which support their administrative complaint. Defendant claims that the investigation was wholly adequate and that the extent of their investigations should be left to agency discretion. The Court has reviewed the administrative record in this case. Its pages number almost four thousand. The two General Counsel Reports are thoughtful and well-reasoned. There is no evidence that the Commission failed to investigate adequately the plaintiffs' administrative complaint.

IV. Conclusion

The Court finds that the plaintiffs failed to show that the Commission's disposition of their administrative complaint was arbitrary, capricious and contrary to law. Therefore, the plaintiffs' motion for summary judgment and declaratory relief is denied. Because the Court finds that the Commission acted in a reasonable manner in its interpretation and application of the Federal Election Campaign Act as to the administrative complaint filed by the plaintiffs, the defendant's Motion for Summary Judgment is

granted, pursuant to Federal Rule of Civil Procedure 56(a).

/s/ JUNE L. GREEN
JUNE L. GREEN
U.S. District Judge

Dated: March 30, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1864 (JLG)

JAMES E. AKINS, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

[Filed: Mar. 30, 1994]

ORDER

Upon consideration of the cross-motions for summary judgment filed by the parties in the above-captioned case, the oral arguments presented to the Court and the entire record herein, it is by the Court this 30th day of March 1994 hereby

ORDERED that plaintiffs' Motion for Summary Judgment is denied; it is further

ORDERED that defendant's Motion for Summary Judgment is granted; and, it is further

ORDERED that the above-captioned case is dismissed with prejudice.

/s/ JUNE L. GREEN
JUNE L. GREEN
U.S. District Judge

APPENDIX E

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2804

IN THE MATTER OF AMERICAN ISRAEL
PUBLIC AFFAIRS COMMITTEE

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on June 16, 1992, do hereby certify that the Commission took the following actions with respect to MUR 2804:

1. Decided by a vote of 6-0 to find no probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. §§ 433 and 434.

   Commissioners Aikens, Elliott, McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision.

2. Decided by a vote of 4-2 to find probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. § 441b, but take no further action.

   Commissioners McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision; Commissioners Aikens and Elliott dissented.

3. Decided by a vote of 6-0 to

a) Close the file in this matter.

b) Direct the Office of General Counsel to send appropriate letters pursuant to the actions noted above.

Commissioners Aikens, Elliott, McDonald, McGarry, Potter, and Thomas voted affirmatively for the decision.

Attest:

6-17-92
Date

/s/ MARJORIE W. EMMONS
MARJORIE W. EMMONS
Secretary of the
Commission

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 2804

IN THE MATTER OF AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE

STATEMENT OF REASONS

On June 9 and 16, 1992, the Federal Election Commission ("Commission") considered the General Counsel's recommendations in MUR 2804 to find probable cause to believe that the American Israel Public Affairs Committee ("AIPAC") violated 2 U.S.C. § 441b and to approve a proposed conciliation agreement.

The General Counsel's May 29, 1992 Report maintained that AIPAC had violated Section 441b by making contributions to or expenditures on behalf of federal candidates in the form of communications to a group of persons that AIPAC considered its members. The General Counsel concluded that this group of persons did not meet the Commission's membership requirements for purposes of the Federal Election Campaign Act of 1971, as amended ("the Act"). In interpreting and applying the decision in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("NRWC"), and subsequent Commission advisory opinions, the General Counsel concluded that the group of persons AIPAC claimed as its members lacked a sufficient right to participate in the governance of the organization to meet the Commission's membership criteria. The General Counsel principally cited the fact that group members at issue here

had no right to vote for the governing body (the Executive Committee) of AIPAC. The General Counsel acknowledged that those members of AIPAC who attended the annual Policy Conference, only a small percentage of the total "members", could vote on the Policy Statement. He concluded however, that this right without more did not meet the Commission's criteria for voting rights or organizational attachment, though he recognized this situation presented a close question. In opposition to the General Counsel's position, AIPAC strenuously argued that it constitutes the quintessential membership organization established to support a particular idea or purpose and that the General Counsel was being unnecessarily rigid in applying the NRWC decision and Commission advisory opinions.

We agreed with the General Counsel's conclusion that AIPAC did not meet the Commission's membership criteria as provided in a series of advisory opinions following the NRWC decision. Thus, we found probable cause to believe AIPAC violated 2 U.S.C. § 441b. We also agreed with the General Counsel that the AIPAC situation presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this, where the organization came close to meeting the "spirit" of the Commission's membership criteria, but failed on a specific point.

Accordingly, given the facts of this case, we decided to exercise our prosecutorial discretion, *see*, *Heckler v. Chaney*, 470 U.S. 821 (1985), and to take no further action with respect to the finding on Section 441b.[2]

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[2] To the extent that any of the violations of Section 441b outlined by the General Counsel in his brief and report are not dependent on the membership issue, we concluded that such instances, i.e., distributing candidate position papers or suggesting to candidate fundraisers who to contact, did not warrant further pursuit since the record did not reflect that these were significant violations.

We emphasize that the circumstances of this decision not to proceed against an organization failing to meet the Commission's definition of membership are narrow. Further we anticipate the Commission soon will conduct a regulatory proceeding to review its membership criteria in an effort to eliminate confusion about these requirements.

27 July 1992 — Date
/s/ SCOTT E. THOMAS
SCOTT E. THOMAS
Vice Chairman

27 July 1992 — Date
/s/ JOHN WARREN MCGARRY
JOHN WARREN MCGARRY
Commissioner

27 July 1992 — Date
/s/ DANNY LEE MCDONALD
DANNY LEE MCDONALD
Commissioner

27 July 1992 — Date
/s/ TREVOR POTTER
TREVOR POTTER
Commissioner

Supreme Court, U.S.
FILED
MAY 7 1997
CLERK

No. 96-1590

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE and ORIN PARKER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ABDEEN JABARA
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May 7, 1997

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STATEMENT

Respondents are politically active voters who by writing and speaking seek to influence the views and actions of members of Congress, executive officials, and the public concerning U. S. foreign policy in the Middle East. Respondents filed a complaint with the Federal Election Commission (FEC or Commission) claiming that the American Israel Public Affairs Committee (AIPAC)--a wealthy lobbying group with a full-time paid staff, several offices, and an annual budget of nearly ten million dollars--is a "political committee" required by law to disclose the amounts and beneficiaries of its election campaign contributions. App. 2a. After investigation, the FEC found that AIPAC routinely has made undisclosed campaign contributions:

> AIPAC has made, in cooperation, consultation, or coordination with federal candidates, communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns.

Certified Administrative Record (CAR) 3672.[1] App. 3a-4a. Evidence obtained by the FEC showed that AIPAC's extensive contributions have been systematically carried out by its staff for many years. CAR 1727-1728, 3678-3724, 3753; App. 3a-4a.

Under 2 U.S.C. § 431(4), whether an organization making "contributions" is a "political committee" depends solely on a quantitative standard--whether the aggregate contributions are "in excess of $1,000 during a calendar year." The FEC

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[1] The Certified Administrative Record appears in the appellate record at R. 10.

found that AIPAC's campaign contributions "likely ... crossed the $1,000 threshold," CAR 3772; App. 4a. Nonetheless, the FEC found "no probable cause to believe" that AIPAC is a political committee. CAR 3672, 3871; App. 4a. The FEC based this decision solely on its conclusion that

> AIPAC's campaign-related activities ... constitute only a small portion of its overall activities and does [sic] not appear to be its major purpose.... AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

CAR 3772; App. 4a. In announcing this holding the FEC neither discussed nor cited any precedents. App. 4a.

Respondents filed suit. They contended that the FEC's "major purpose" standard is contrary to law. Though court holdings embrace a "major purpose" test, this test is different from the test announced by the FEC. Case law holds "major purpose" to be a criterion for determining *whether* an activity undertaken *independently* of a candidate *is* an election "expenditure." Case law does not apply any "major purpose" test at all to "contributions"--expenditures that are not independent, but coordinated with candidates. Nor does case law hold that an organization spending more than $1,000 annually on elections--whether independently or in coordination with candidates--is exempt from "political committee" status if election spending is merely "a small portion" of the group's undertakings.

Respondents argued below that a political group like AIPAC is not exempt simply because its wealth enables it to make large campaign contributions using only a small portion

of its ten million dollar budget. Rather, the Constitution exempts from political committee status only small issue-advocacy groups that limit their campaign activities to occasional, independent expenditures, and that are *so* small that administrative requirements imposed on political committees would unduly burden them, *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), or small, unpopular groups that would be harassed if they complied with political committee disclosure obligations. *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982).[2]

The FEC asserted, however, as it does here, that obiter dicta in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), imposes the Commission's major purpose test. The en banc Court of Appeals disagreed. The court acknowledged that the *Buckley* dicta could be read literally to support the Commission's view, App. 21a; but the court undertook a deeper analysis. It examined what the FEC's petition ignores--the lower court cases which the *Buckley* dicta cited. App. 25a-26a, and n. 11. These cases--*United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) (*NCFI*) and *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (*ACLU*) (three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975)--are the only precedents in which "major purpose" is an element of the holding, rather than dicta. The Court of Appeals held that these cases, and the court's discussion in *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), reject the FEC's view. It held the cases support respondents' interpretation of the major purpose test, under which "it is the purpose of the

---

[2] *MCFL* and *Brown* exempt groups from specific administrative or disclosure obligations, rather than from political committee status, itself. There is no claim that AIPAC qualifies for exemption under either *MCFL* or *Brown*.

organization's disbursements, not of the organization itself, that is relevant." App. 26a.

ARGUMENT

Merits

The FEC's "major purpose" test conflicts with the fundamental goal of the Campaign Act. This goal is to prevent corruption and the appearance of corruption that result when "large contributions are given to secure a political *quid pro quo* from current and potential office holders." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Given this goal, the *amount* of an organization's election spending, not whether the amount constitutes a major or minor part of the organization's budget, is the relevant consideration. The Court of Appeals properly held that the Commission's major purpose test "would wholly eviscerate" the statute, since "an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget would not." App. 27a.[3]

[3] Contrary to the FEC's petition at 21, "the court of appeals' approach" would not exempt from political committee status an organization devoting $1 million of its $100 million budget to independent expenditures, rather than contributions. The court held "it is the purpose of the organization's disbursements, not of the organization itself, that is relevant." App. 26a. Thus, if the major purpose of an organization's independent disbursements is to influence elections, then those disbursements are "independent expenditures." *NCFI*, 469 F.2d at 1141. All organizations that make independent expenditures exceeding $1,000 in a year are political committees, except to the extent a constitutional exemption under *MCFL* or *Brown* applies. Nothing in the opinion below exempts from political committee status wealthy organizations that make large independent expenditures using small portions of enormous budgets.

Given the goal of the statute, it makes no sense to exempt a dual-purpose organization simply because election spending is its "minor" purpose, carried out by one department, while other departments pursue the "major" purpose. This is particularly true if the organization's major purpose is lobbying for favors from legislators to whose campaigns the organization contributes. A systematic program of lobbying linked to campaign contributions, implemented continuously over a number of election cycles, presents both an appearance and a danger of *quid pro quo* corruption. "[C]ampaign-related activities and communications ... undertaken as an adjunct to, and in support of, ... lobbying efforts," CAR 3772--in other words, precisely what AIPAC does--are the principal concern of the Act.

Under the erroneous "major purpose" standard announced by the FEC, lobbying organizations that use campaign contributions to wield influence in Congress are exempt from political committee status if their size, wealth, and power enable them to attain their goals by spending on elections only "small portions" of their large bank accounts. This is not a permissible construction of the statute. It defeats the fundamental purpose of the law. Courts "must reject administrative constructions of the statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).[4]

[4] The FEC's major purpose test is also contrary to the statute's unambiguous quantitative standard--"in excess of $1,000 during a calendar year"--which governs whether an organization making campaign contributions is a political committee. For this reason as well, the FEC's test cannot be deemed a valid interpretation of the statute. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984).

Contrary to the FEC's petition at 21, the FEC's proposed evisceration of the statute is not "inherent in the 'major purpose' test adopted by this Court in *Buckley*." The *Buckley* Court did not adopt the FEC's test. Rather, dicta in *Buckley* noted with approval the decisions in *NCFI* and *ACLU*, which adopted a very different test.

In *NCFI*, the court considered whether a $17,850 newspaper advertisement was an "expenditure," and whether "solely on the strength of this one advertisement and contributions made in response to it" the National Committee must be deemed a "political committee." *Id.* at 1138. To determine whether the advertisement was an "expenditure" the court construed the statutory definition's key phrase, "made for the purpose of influencing [an] ... election." Interpreting the statute to avoid First Amendment issues, *id.* at 1140, the court held

> We ... construe the words "made for the purpose of influencing" in [the statutory definitions of "contribution" and "expenditure"] to mean an expenditure made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents.... We also construe the Act to apply only to committees soliciting contributions or making *expenditures the major purpose of which* is the nomination or election of candidates. [Emphasis added.]

469 F.2d at 1141.

Two points are important here. First, the *NCFI* court applied the "major purpose" test only to *independent* disbursements--those made without coordination with a candidate. Second, the court held "major purpose" to be a criterion for determining *whether* a particular independent disbursement *is* an election "expenditure." The court did not

hold that an organization found to be making independent expenditures is exempt from the Act unless those types of disbursements are the major purpose of the organization overall.

Applying its holding to the advertisement at issue, the court concluded the ad was not an "expenditure":

> Here neither statutory test is met: any authorization or control by any candidate--indeed any connection whatsoever between the National Committee and any candidate--is missing and *the major purpose of the advertisement* was to promote the impeachment movement and to condemn governmental policy on the Vietnam war, *not to elect candidates*. [Emphasis added.]

469 F.2d at 1141.

Having announced this holding, the court went on to say, in dicta, that its interpretation of the phrase "for the purpose of influencing ... [an] election" might make "enforcement of the Act ... somewhat more burdensome, as the supervisory officials will be forced to glean the principal or *major purpose of the organizations* they seek to have comply with the Act." *Id.* at 1142. (Emphasis added.) In light of the court's analysis and holding, its reference to "major purpose of the organizations" concerns the organizations' major purpose *in making particular disbursements*. The court did not address the major purpose of an organization in general, as distinguished from the organization's purpose in making particular payments. The court did not face, and had no reason to consider, a situation in which a group's major purpose, overall, might be different from the organization's major purpose in making a particular disbursement.

In *ACLU*, the court considered an advertisement similar to the ad in *NCFI*. The court adopted the *NCFI* holding. The court stated that holding as follows:

> [T]he Court [in *NCFI*] promulgated a dual statutory test limiting the reach of Title III: (1) the determinative phrase "made for the purpose of influencing," is to include only those expenditures "made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents," and (2) Title III is applicable "only to committees soliciting contributions or making *expenditures the major purpose of which* is the nomination or election of candidates." 469 F.2d at 1141.

366 F. Supp. 1057 (emphasis added). The phrase "major purpose of the organization" does not appear in *ACLU*.

In *Buckley*, plaintiffs claimed the reporting and disclosure provisions applicable to political committees were overbroad "in their application to minor-party and independent candidates and in their extension to contributions as small as $1 or $101." 424 U.S. at 61. No other challenge to these provisions was raised. *Id.* at 60.[5]

The *Buckley* plaintiffs also challenged former § 434(e) (now, 434(c)), the dislosure provision applicable to persons

[5] The Court declined to issue a "blanket exemption" for minor parties, 424 U.S. 72-74, holding instead that they would be entitled to exemption from disclosure requirements upon showing "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74. The Court reaffirmed this approach in *Brown*. Under *Buckley* and *Brown*, the First Amendment grants exemption from disclosure only on an as-applied, case-by-case basis where specific showings are made.

other than political committees. *Id.* at 61. The Court noted that disclosures required of these persons are of special concern because "the relation of the information sought to the purposes of the Act may be too remote." *Id.* at 79-80.[6]

In discussing this issue, the Court, in dicta, said the phrase, "for the purpose of . . . influencing [an] election," also should be narrowly construed in the provisions applicable to "political committees." This phrase, the Court reasoned, "could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79. The Court cited *NCFI* and *ACLU*, with approval, 424 U.S. at 79, n. 106, then added:

> To fulfill the purposes of the Act they [the words "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Like *NCFI* and *ACLU*, *Buckley* said the problem lies in the vagueness and potential overbreadth of the phrase "for the purpose of influencing [an] election." As in *NCFI*, *Buckley*'s discussion of "major purpose" concerned the problem of determining when an organization's activities should be deemed "expenditures." The Court said that expenditures could be presumed to be campaign related if they were made by "an organization the major purpose of which is the nomination or election of a candidate."

[6] The Court held this concern properly could be met by deeming independent "expenditure" to mean "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80.

The reasoning in *Buckley* did not conclude that the phrase "political committee," itself, must be given a narrowing construction *in addition to* that which results simply from construing narrowly the phrase "for the purpose of influencing ... [an] election." *Buckley* did not suggest that *two* "major purpose" tests apply--one to determine whether an activity is an expenditure, then another to determine whether making these expenditures is a group's major purpose overall. Nor is there any language in the statute that could bear such a construction.

The aim of the discussion in *Buckley* was to ensure that "groups engaged *purely* in issue discussion" would not be deemed "political committees." 424 U.S. at 79. (Emphasis added.) The Court did not address circumstances in which the major purpose of an organization, overall, might be different from the major purpose of one or more of the organization's expenditures. It did not consider the question of dual- or multi-purpose organizations. *Buckley* did not say that discussion groups which also make campaign disbursements "fall[ing] within the core area sought to be addressed by Congress" are nonetheless exempt from regulation--no matter what the amount of their election spending--provided "issue discussion" is the major purpose of the organization overall.[7]

In *MCFL*, the Court mentioned "major purpose" in dicta discussing circumstances that would render a small issue advocacy group a political committee. As recounted by the

[7] During the ten years after *Buckley*, the FEC issued numerous advisory opinions applying the legal test for "political committee" designation. None of them suggested that an organization making "expenditures" or "contributions" exceeding $1,000 in a year would be exempt from "political committee" designation if these expenditures or contributions were a "small portion" of the organization's overall activities, or if election spending were not a major purpose, or not the major purpose, of the organization. App 28a, n. 12.

opinion in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, (1990), the *MCFL* Court held

> that a federal statute requiring corporations to make independent political expenditures only through special segregated funds, 2 U.S.C. § 441b, burdens corporate freedom of expression.... The Court reasoned that the *small* nonprofit corporation in that case would face certain organizational and financial hurdles in establishing and administering a segregated political fund.... These hurdles "impose[d] administrative costs that many *small* entities [might] be unable to bear" and "create[d] a disincentive for *such* organizations to engage in political speech." [Emphasis added.]

In addition to the burden that would be imposed on MCFL, due to its small size, the Court noted that MCFL was a nonprofit corporation with no funding from business corporations or labor unions.[8] The Court also stressed that MCFL's election activity was limited to occasional independent expenditures. 479 U.S. at 252 and 252 n. 6.

The Court said that independent expenditures produce speech at the core of the First Amendment, 479 U.S. at 251, and that "restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* at 259-260. The Court held that MCFL's occasional independent political activity posed no "threat of the danger that has prompted regulation," and that administrative requirements which would burden the small organization therefore were not justified. *Id.* at 263. The Court, in dicta, at 262, added the following caveat:

[8] AIPAC, however, unlike MCFL, does receive some contributions from corporate bank accounts. CAR 3776-3777; App 25a, n. 10.

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U.S., at 79.

Thus, the *MCFL* dicta said that "extensive" independent election spending would render even a small "issue advocacy" organization a political committee. Nothing in the opinion implied that constitutional concerns require exemption of a wealthy organization that makes extensive campaign contributions in support of its lobbying, posing a potential threat of *quid pro quo* corruption. Nor did the Court say that its concern for the impact of administrative burdens on small organizations would extend to a large sophisticated organization with a full-time paid staff already accustomed to meeting many administrative requirements. The *MCFL* Court neither held nor suggested that a wealthy lobbying group routinely making contributions exceeding $1,000 per year is exempt from political committee designation, provided its contributions are only a "small portion" of its large budget.[9]

Neither *Buckley* nor *MCFL*, nor any constitutional interest, requires evisceration of the statute by an across-the-board narrowing construction based solely on "budget portion" or overall organizational purpose. The FEC's approach, which is entitled to no deference,[10] is both overbroad and unnecessary.

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[9] Nor did FEC advisory opinions issued after *MCFL* so hold or suggest. App. 28a, n. 12. It was only after this litigation began that FEC advisory opinions started to reflect the FEC's major purpose test. *Id.*

[10] The FEC maintains that its major purpose test is a narrowing construction required by constitutional concerns. These concerns, however, are not within the Commission's special expertise. The FEC's view of the Constitution is entitled to no deference.

The FEC raises "the danger that an organization might be subject to extensive disclosure requirements with respect to non-campaign-related receipts and disbursements based on its modest involvement in campaign activity." Pet. at 21. The FEC says its major purpose test "reflects ... the *Buckley* Court's concern ... that ... disclosure requirements might have the effect of unnecessarily burdening the non-campaign-related speech of an organization that only occasionally makes election expenditures." *Id.* The FEC's test, however, is not limited to organizations that make only "modest" or "occasional" election expenditures. The FEC's test exempts organizations that flood every election with millions of dollars of contributions, provided they spend many more millions of dollars for other purposes--such as lobbying for favors from the officials whom the campaign contributions helped to elect.

The FEC's test, moreover, would exempt from disclosure not only an organization's non-campaign activities, but also its campaign contributions. To the extent forced disclosure of non-campaign activities is a constitutional concern, the appropriate remedy would be to exempt *these* activities from disclosure, not the campaign contributions. Respondents seek the identities of the beneficiaries and the amounts of AIPAC's campaign contributions. The FEC makes no claim that the statutory requirement for disclosure of this information is unconstitutional as applied to AIPAC. If forced disclosure of AIPAC's non-campaign activities would be unconstitutional, the FEC can simply decline to order AIPAC to disclose them. That is not a reason, however, to allow AIPAC's campaign contributions to remain secret.[11]

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[11] Contrary to the FEC's petition at 22, the disclosure obligations applicable to others are no substitute, on the facts here, for the statutory requirement that political committees disclose their campaign contributions. The obligation to disclose independent expenditures does not apply, because AIPAC's activities are contributions, not independent

This is a simple case. AIPAC meets the statutory definition of a "political committee" because it routinely makes "contributions" to candidates in aggregate amounts likely exceeding $1,000 per year. Nothing more is required. The statutory obligations imposed on political committees are not unconstitutional as applied to AIPAC. The *MCFL* exemption applies to organizations that only occasionally make independent expenditures posing no threat or appearance of corruption, where the organization, due to its small size, would be unduly burdened by the Act's administrative requirements. AIPAC's election activities are "contributions," not "independent expenditures." They are not "occasional." They are extensive, multi-year activities presenting an appearance and potential threat of *quid pro quo* corruption. AIPAC is a large, sophisticated organization with a paid full-time staff that would not be unduly burdened by the administrative duties imposed by the Act. AIPAC made no such claim during the FEC proceedings, and nothing in the record would support such a finding. Nor is there any basis for exemption of AIPAC under *Brown*.

Standing

The Court of Appeals properly held that respondents have standing to seek disclosure of the beneficiaries and amounts of

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expenditures. The beneficiaries' obligation to report contributions they receive is ineffective, since candidates and their committees do not know all of the efforts made on their behalf by AIPAC, let alone the amount of money AIPAC has spent on them. It is AIPAC that knows this information. The FEC has access to every candidate's disclosures, yet it has not identified a single one that has reported receiving any of AIPAC's extensive in-kind campaign contributions. These points aside, the Court of Appeals properly held the FEC's argument about other statutory obligations to be irrelevant, since "[t]here is no indication that Congress intended to limit one section in light of others or to make their application mutually exclusive." App. 27a.

AIPAC's campaign contributions. App. 6a-18a. The standing issue is neither novel nor complex. Respondents are voters who seek disclosure of information which Congress specifically intended voters to have. Respondents seek this information to aid their own exercise of the franchise and to inform other voters, as well as government officials and the public at large.

Non-disclosure of information, revelation of which is required by law, is injury sufficient to confer standing under Article III. *Public Citizen v. Department of Justice*, 491 U.S. 440, 449-50 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). If this were not true, no one would ever have standing to contest in federal court a federal agency's refusal to disclose information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. Thus, the Court of Appeals properly held that respondents' injury is not a "generalized grievance." App. 11a-12a. Like FOIA litigants, respondents requested disclosure through administrative proceedings authorized by statute and filed suit under a statute specifically conferring a right of judicial review.[12]

The only difference between respondents and FOIA litigants is that respondents seek an order requiring the government to enforce disclosure obligations applicable to a third party, rather than to disclose information the government already has. This difference raises only the questions of causation and redressability, which the Court of Appeals analyzed in detail and correctly resolved. App. 14a-15a. Since the FEC's erroneous legal interpretation was its sole reason for exempting AIPAC from the disclosure

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[12] Under 2 U.S.C. § 437g(a)(1), "[a]ny person who believes a violation of [the Campaign] Act . . . has occurred, may file a complaint with the Commission." Another provision of the Act, § 437g(a)(8)(A), states that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may seek judicial review.

requirement that respondents seek to enforce, respondents' injury is directly traceable to the administrative ruling they challenge. Judicial correction of the agency's legal error will, under the FEC's own findings, obligate AIPAC to disclose the information respondents seek. These points establish causation and redressability.[13]

Respondents also meet the non-constitutional, zone-of-interests test for standing. This test "is not meant to be especially demanding." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that two of the three purposes of the Campaign Act's disclosure requirements were intended to serve the information interests of the public, the electorate, and each individual voter:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office.
>
> * * *
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.
>
> * * *

[13] That the Commission may wish to reconsider its findings in the future, Pet. at 29, n. 11, is no ground for denying respondents' standing now. Nor is the possibility that AIPAC might defy a disclosure order--or burn its records and flee the country--relevant to respondent's Article III standing. If it were, no one could ever have standing to challenge agency non-enforcement of a third party's legal obligations. The possibility of defiance or evasion by the third party is present in all such cases.

> Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations [established by other sections of the campaign finance law].

424 U.S. 67-68. (Footnotes omitted.)

The Campaign Act recognizes that ballot-box decisions by individual voters are a primary means of fighting the threat and appearance of *quid pro quo* corruption involving elected officials and campaign contributors. The Act recognizes that each individual voter is entrusted with governmental power, equal to that of every other voter, to decide which candidates are, or may be, corrupted by campaign contributions, and to cast their ballots accordingly. The disclosure provisions of the statute are intended to arm voters with information about campaign contributions to better enable them to make their individual ballot-box decisions. The interest of each voter in information about campaign contributions is squarely within the zone of interests intended to be served by the statute.

The Campaign Act also recognizes that another potent weapon against corruption, and the appearance of corruption, is publicity. Publicity is the principal means by which voters receive campaign finance information useful to their exercise of the franchise. Publicity also is a direct weapon. It may induce officeholders to change views, reverse actions, or acknowledge errors before the next election, so that the electorate need not vote against them to achieve reform. Publicity also arms the public at large, empowering it to press officeholders for reform, where publicity by itself is an insufficient inducement. The information interests of the public, and the information interests of those who would inform officeholders and the public about campaign

contributions, through speaking and writing, are plainly within the zone of interests intended to be served by the Act.

The Court of Appeals properly held that respondents meet the non-consititutional test for standing. App. 16a-18a.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 96-1590

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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FEDERAL ELECTION COMMISSION, PETITIONER

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JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

A. In our petition for a writ of certiorari, we explain that the "major purpose" test announced by this Court in *Buckley* v. *Valeo*, 424 U.S. 1, 79 (1976) (per curiam), serves to ensure that occasional election-related disbursements do not subject an organization to the comprehensive disclosure requirements, covering *all* receipts and disbursements, that are applicable to political committees under the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.* Pet. 15-17. We further explain (Pet. 17-20) that the justifications for the "major purpose" test apply with equal force whether the disbursements that trigger the reporting requirements

are independent expenditures or direct contributions. The court of appeals in this case therefore erred in holding that the "major purpose" test is inapplicable to any organization that makes more than $1,000 in campaign contributions in a calendar year.

Respondents defend the court of appeals' judgment, but on a quite different theory. In respondents' view, the "major purpose" test serves to identify those disbursements that are "expenditures" within the meaning of the FECA. They contend (Br. in Opp. 4 n.3) that any disbursement whose "major purpose" is the election or defeat of a candidate is an "expenditure," and that "[a]ll organizations that make independent expenditures exceeding $1,000 in a year are political committees, except to the extent a [distinct] constitutional exemption * * * applies." Respondents argue that the relevant inquiry should focus on the "major purpose" of a particular disbursement, not on the "major purpose" of the organization as a whole.

That view cannot be reconciled with this Court's precedents. In *Buckley*, this Court stated that "[t]o fulfill the purposes of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*." 424 U.S. at 79 (emphasis added). Grammatically, the word "organizations" is the only possible antecedent for the phrase "of which." Respondents' view of the "major purpose" test is further undermined by the ensuing pages of the *Buckley* opinion, which addressed the term "expenditure" as it applies to independent expenditures made by individuals and by groups other than "political committees." See *id.* at 79-82. The Court construed the term as "reach[ing] only funds used for communications that

expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted). The Court did not suggest that it was articulating two different tests for an independent expenditure—*i.e.*, one employing the "express advocacy" requirement when applied to individuals and to groups other than political committees, and another employing the "major purpose" test to identify those disbursements counting towards the $1,000 threshold for political committee status.

This Court's subsequent decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), makes it particularly clear that the relevant inquiry focuses on the organization's major purpose, not on the major purpose of an individual disbursement. As our petition explains (see Pet. 16-17), the *MCFL* plurality deemed it "undisputed" that MCFL was not a "political committee" because "[i]ts central organizational purpose [wa]s issue advocacy," 479 U.S. at 252 n.6, notwithstanding the fact that the organization had made FECA "expenditures" of nearly $10,000 during the calendar year in question, *id.* at 244, 248-251. The majority observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. *MCFL* makes clear that it is "the organization's major purpose," *ibid.*—not the major purpose of any particular disbursement—that is dispositive of the "political committee" inquiry.

Moreover, a test focusing on the "major purpose" of a particular disbursement would not satisfactorily address the practical and constitutional problems potentially created by the Act's political committee

provisions. A political committee is required to make comprehensive disclosures of *all* of its receipts and disbursements, even those that bear no direct relation to electoral campaigns. See, *e.g.*, 2 U.S.C. 434(b)(3)(G), 434(b)(6)(B)(v). There is consequently a significant danger that small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose non-campaign-related receipts and disbursements, including receipts and disbursements used for issue advocacy. A narrowing construction of the term "expenditure" alone would not alleviate that risk.[1]

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[1] Respondents also suggest (Br. in Opp. 13) that, "[t]o the extent forced disclosure of non-campaign activities is a constitutional concern, the appropriate remedy would be to exempt *these* activities from disclosure, not the campaign contributions." That argument is flawed in several respects. First, it is inconsistent with *Buckley* and *MCFL*. Those decisions responded to constitutional concerns by announcing a limiting construction of the term "political committee," not by exempting (or authorizing the Commission to exempt) such committees from the requirement that they disclose all of their receipts and disbursements. Second, although it might be possible to segregate an organization's campaign-related *disbursements*, political committees are also required, *inter alia*, to disclose all of their *receipts*, which are not normally earmarked for campaign or other activity. The approach proposed by respondents therefore would not fully address the practical and constitutional difficulties that the "major purpose" test was intended to resolve.

Finally, the determination that an organization is not a political committee does not serve to "exempt" its campaign contributions from the FECA's disclosure requirements. As our petition explains (Pet. 4, 22), contributions aggregating more than $200 from any person to a candidate or political committee must be reported by the recipient. See 2 U.S.C. 434(b)(3). Although certain coordinated expenditures could be made in a manner that would make it difficult for the recipient candidates to learn of such contributions and to be able to report them (see Br. in Opp. 13-14 n.11), that potential barrier to a candidate's complete reporting of coordinated expenditures made on his behalf exists even where the contributors are individuals.

Respondents make little effort to reconcile their position with this Court's own articulation, in *Buckley* and *MCFL*, of the criteria for political committee status. They rely instead (Br. in Opp. 3) on two lower court decisions—*United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) (*NCFI*), and *American Civil Liberties Union, Inc.* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (*ACLU*), vacated as moot *sub nom. Staats* v. *American Civil Liberties Union, Inc.*, 422 U.S. 1030 (1975)—that were cited by this Court in *Buckley*. See 424 U.S. at 79 n.106 ("At least two lower courts, seeking to avoid questions of unconstitutionality, have construed the disclosure requirements imposed on 'political committees' * * * to be nonapplicable to nonpartisan organizations."). Respondents' approach is flawed in two respects.

First, the lower court decisions on which respondents rely are hardly as unequivocal as respondents suggest. The Second Circuit's opinion in *NCFI* contains language supporting both approaches to the identification of "political committees." On the one hand, the *NCFI* court stated that it would "construe the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates," 469 F.2d at 1141—language suggesting that the inquiry should focus on the purpose of particular receipts and disbursements. On the other hand, the

court observed that, under its construction of the FECA, federal officials enforcing the Act "will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." *Id.* at 1142. The court noted as well that "the words of the Act seem to indicate that Congress' concern was primarily with groups organized or at least authorized by a particular candidate and whose principal focus is a specific campaign." *Id.* at 1140. Those passages suggest that the overall character of the organization should be dispositive of the "political committee" question.

In any event, close analysis of the lower court decisions cited by the *Buckley* Court would be appropriate only if such analysis were helpful in resolving an ambiguity in *Buckley* itself. As we explain above, no such ambiguity exists. Rather, the *Buckley* Court stated unequivocally that an organization will be considered a political committee only if the *organization's* major purpose is campaign activity.[2] The Court reaffirmed that conclusion in *MCFL*. Respondents' apparent view that this Court misconstrued the lower court decisions in *NCFI* and *ACLU* provides no justification for the court of appeals' refusal to accept at face value the Court's interpretation of the Act's "political committee" provision.

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[2] The *Buckley* Court stated that the decisions in *NCFI* and *ACLU* had "construed the disclosure requirements imposed on 'political committees' * * * to be nonapplicable to nonpartisan organizations." 424 U.S. at 79 n.106. This Court evidently interpreted those decisions as focusing on the character of the organization rather than on the character of a particular disbursement.

B. Respondents lack standing to bring their suit. Contrary to respondents' contention (see Br. in Opp. 15), their suit is not properly analogized to one brought under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The gravamen of a FOIA action is that a government agency has breached its legal duty to disclose to the plaintiff information actually in the possession of the government. Respondents, by contrast, challenge the Commission's failure to acquire, through means of an enforcement action, information in the possession of a private party. This Court has recognized that, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (internal quotation marks omitted).

Respondents also contend (Br. in Opp. 16) that they "meet the non-constitutional, zone-of-interests test for standing." The zone-of-interests test was devised as "a gloss on the meaning of [5 U.S.C.] § 702." *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 395 (1987). Section 702—the judicial review provision of the Administrative Procedure Act (APA)—authorizes suits by persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. While this Court has applied the zone-of-interests test outside the context of APA review, it has "made clear * * * that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so

for other purposes." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1161 (1997) (internal quotation marks omitted).

The statutory review provision under which respondents' action was brought is narrower than that in the APA: it does not authorize suits by persons "adversely affected," but only by persons "aggrieved" by the Commission's dismissal of a complaint. 2 U.S.C. 437g(a)(8)(A); cf. *Liquid Carbonic Indus. Corp.* v. *FERC*, 29 F.3d 697, 702 (D.C. Cir. 1994) (Federal Power Act provision authorizing judicial review for "[a]ny party * * * aggrieved" is narrower than APA's judicial review provision). Moreover, Section 437g(a)(8)(A) applies in an area—the decision by a government agency not to undertake an enforcement action against a private party—that is typically not subject to judicial review at all. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 616-619 (1973). Those aspects of the Act weigh strongly against respondents' apparent conclusion (see Br. in Opp. 15) that *any voter* would have standing to challenge the Commission's enforcement decision in this case.

* * * * *

For the reasons stated above, and in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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Supreme Court, U.S.
FILED
AUG 21 1997
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No. 96-1590

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: APRIL 7, 1997
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 92-CV-1864

JAMES E. AKINS, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION

[Filed: 8/12/92]

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
8/12/92	1	COMPLAINT filed; Exhibits (7); summons (3) issued (ks) [Entry date 08/18/92]
	* * * * *	
10/8/92	7	ANSWER for defendant FEC, (1pp) [Entry date 10/09/92]
	* * * * *	

1/7/93	22	AMENDED COMPLAINT by plaintiff(s) amending complaint [1-1] (1pp) [Entry date 01/27/93]
	* * * * *	
8/31/93	29	ANSWER by defendant FEC to amended complaint (1pp) [Entry date 09/01/93]
	* * * * *	
11/4/93	38	MOTION filed by plaintiff(s) for summary judgment, Exhibits: (11) (1pp) [Entry date 11/08/93]
	* * * * *	
12/17/93	43	MOTION filed by defendant FEC for summary judgment (1pp) [Entry date 12/20/93]
	* * * * *	
1/3/94	46	RESPONSE by plaintiffs in opposition to motion for summary judgment [43-1] by FEC. (ab) [Entry date 01/04/94]
1/3/94	47	REPLY by plaintiffs to response to motion for summary judgment [38-1] by plaintiffs (ab) [Entry date 01/04/94]

1/14/94	48	REPLY by defendant to response to motion for summary judgment [43-1] by FEC (ab) [Entry date 01/24/94]
	* * * * *	
1/26/94	—	MOTION HEARING before Judge June L. Green: by FEC motion for summary judgment [43-1] heard and taken under advisement; by plaintiffs motion for summary judgment [38-1] heard and taken under advisement. Reporter: Bill Rhodes (ab)
3/30/94	50	OPINION by Judge June L. Green (N) (bjl)
3/30/94	51	ORDER by Judge June L. Green: granting motion for summary judgment [43-1] by FEC, denying motion for summary judgment [38-1] by plaintiffs; dismissing this case with prejudice. (N) (bjl)
4/22/94	52	NOTICE OF APPEAL by plaintiff(s) RICHARD CURTISS, plaintiff(s) GEORGE BALL, plaintiff(s) JAMES E. AKINS,

plaintiff(s) ORIN PARKER, plaintiff(s) ANDREW I. KILLGORE, plaintiff(s) ROBERT J. HANKS, plaintiff(s) PAUL FINDLEY from order dismissing this case with prejudice. * * * [Entry date 4/25/94]

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5088

JAMES E. AKINS, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION

[Filed: 4/26/94]

DOCKET ENTRIES

DATE	PROCEEDINGS
4/26/94	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant James E. Akins, Appellant George Ball, Appellant Richard Curtiss, Appellant Paul Findley, Appellant Robert J. Hanks, Appellant Andrew I. Killgore, Appellant Orin Parker [51180-1] (lrn)
	* * * * *
3/10/95	ORAL ARGUMENT HELD before Edwards, Silberman, Sentelle (ddm)
3/13/95	PER CURIAM ORDER filed directing the parties to file supplemental briefs

nte 20 pages by 3/27/95; The supplemental briefs shall be limited to addressing the following issue: Whether, in a case of this sort, there can be standing based on a citizen's right to receive information under the disclosure provisions of this statute, and/or whether appellants can satisfy standing requirements by showing that they have been injured as political competitors of AIPAC. [110012-1] Before Judges Edwards, Silberman, Sentelle. (cwc)

* * * * *

9/29/95 JUDGMENT for the reasons in the accompanying opinion affirming. [152589-1] Before Judges Edwards, Silberman, Sentelle. (edb)

9/29/95 OPINION (14 pgs) for the Court filed by Judge Sentelle, CONCURRING IN PART & DISSENTING IN PART OPINION (13 pgs) filed by Judge Silberman. (edb)

* * * * *

11/1/95 PER CURIAM ORDER filed amending concurring in part and dissenting in part opinion filed by Laurence H. Silberman [152590-2]. Before Judges Edwards, Silberman, Sentelle. (edb)

11/13/95 PETITION for rehearing [162229-1] and SUGGESTION, for rehearing en banc [162229-2] (19 copies) filed by Appellants James E. Akins, et al. (c/s dated 11/13/95). (lvs)

* * * * *

1/26/96 PER CURIAM ORDER filed denying appellant's petition for rehearing [162229-1] filed November 13, 1995. Before Judges Edwards, Silberman, and Sentelle. [CIRCUIT JUDGE SILBERMAN WOULD GRANT THE PETITION FOR REHEARING]. (jth)

1/26/96 PER CURIAM ORDER, In Banc, filed granting the suggestion for rehearing in banc [162229-2]. This case will be considered and decided by the court sitting In Banc on both the standing and statutory construction issues. FURTHER ORDERED, by the Court, In Banc, that the judgment filed on September 29, 1995 is vacated. A future order will govern further proceedings. Before Judges: Edwards, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel. (jth)

* * * * *

5/8/96 ORAL ARGUMENT HELD before Edwards, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. (ddm)

* * * * *

12/6/96 JUDGMENT for the reasons in the accompanying opinion reversing [239295-1]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Buckley *.* At the time of in banc

argument, Judge Buckley was a circuit judge in active service. He assumed senior status 9/1/96. (edb)

12/6/96 IN BANC OPINION (23 pgs) for the Court filed by Judge Silberman, DISSENTING OPINION (9 pgs) filed by Judge Sentelle with whom Circuit Judge Henderson joins. (edb)

* * * * *

1/3/97 PER CURIAM ORDER, In Banc, filed amending In Banc opinion filed by Circuit Judge Laurence H. Silberman [239302-1]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Buckley. (edb)

* * * * *

4/10/97 NOTICE filed by Clerk, Supreme Court of the United States, informing the court that a writ of certiorari was filed April 7, 1997 and placed on the docket April 8, 1997 in case No. 96-1590 [264958-1]. (lvs)

6/17/97 NOTICE filed by Clerk, Supreme Court, advising of the entry of an order on 06/16/97, granting the petition for writ of certiorari. Supreme Court Docket No. 96-1590. [279831-1]. (jth)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1864 (JLG)

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PLAINTIFFS

v.

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(202) 219-3690
DEFENDANT

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs bring this action for declaratory and injunctive relief against the Federal Election Commission (hereinafter "FEC"). Pursuant to 2 U.S.C. § 437g(a)(8) plaintiffs are entitled to file this action against the FEC for its dismissal of their complaint against the American Israel Public Affairs Committee (hereinafter "AIPAC").

2. The FEC's investigation and resolution of plaintiffs' complaint failed to meet the requirements of the Federal Election Campaign Act of 1971, as amended (hereinafter "Campaign Act"). The FEC failed to make a proper determination whether AIPAC must register as a political committee and comply with the disclosure provisions of 2 U.S.C. § 434(a). In the alternative, the FEC improperly failed to address whether AIPAC must comply with the disclosure provisions of 2 U.S.C. § 434(c)(i), which apply to organizations that are not political committees.

3. According to these provisions, AIPAC, either as a political committee or as an organization making campaign expenditures exceeding $250 per year, should report the sources of its money and all campaign expenditures and contributions. Although the FEC found that AIPAC made illegal corporate expenditures in federal campaigns, and the amount of these expenditures clearly exceeded $250 per year, the FEC did not require AIPAC either to register as a political committee or to comply with the disclosure provisions applicable to others who make expenditures or contributions exceeding this statutory threshold.

4. The FEC's improper action has harmed the electoral and political processes. It has undermined policies of the Campaign Act intended to limit the effect of any one special interest group on candidates, and to ensure that the sources, amounts, and beneficiaries of interest group political expenditures are exposed to public view.

5. The FEC's improper action has injured plaintiffs. Plaintiffs are politically active persons who, individually or as members of organizations, oppose AIPAC views on U.S. foreign policy in the Middle East. On this subject, plaintiffs compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public. The FEC's improper action on plaintiffs' administrative complaint has given AIPAC an illegal advantage in this competition. It has enabled AIPAC to supplement its political lobbying with unreported campaign expenditures derived from secret sources.

6. The FEC's improper action has deprived plaintiffs of their legal right to learn the sources, amounts, and beneficiaries of AIPAC's unreported

campaign expenditures. The unavailability of this information to plaintiffs impedes their efforts to show legislative and executive policymakers and the public that AIPAC's great influence on U.S. foreign policy stems not from the merits of its views but principally from its ability to wield enormous financial power, through means including campaign spending.

7. By depriving plaintiffs of their legal right to information useful to their efforts to oppose AIPAC's grip on the American political and electoral processes, the FEC illegally has disadvantaged plaintiffs, causing them to suffer "diminution in their political voices—their influence in federal elections." *International Association of Machinists and Aerospace Workers v. Federal Election Commission*, 678 F.2d 1092, 1098 (D.C. Cir. 1982). Grant of the relief sought by plaintiffs would provide plaintiffs the information to which they are legally entitled and would remove the unlawful advantage enjoyed by AIPAC in its political competition with plaintiffs.

JURISDICTION AND VENUE

8. This Court has jurisdiction of this action under 28 U.S.C. § 1331, and 2 U.S.C. § 437g(a)(8)(A).

9. Venue resides in this district pursuant to 2 U.S.C. § 437g(a)(8)(A), and 28 U.S.C. § 1391(b) and (e).

PARTIES

10. **Plaintiffs:**

(a) James E. Akins is a citizen of the United States over the age of 18 years and a registered voter in the District of Columbia. He is a former United States Ambassador. He has been and continues to be active in seeking to influence policymakers and the public on U.S. policy in the Middle East. He writes

and speaks widely on this subject. Many of the views he holds and seeks to impart on this subject are opposed to AIPAC's views. The action of the FEC giving rise to this complaint has injured him in the manner stated in paragraphs 5-7 above.

(b) George Ball is a citizen of the United States over the age of 18 years and a registered voter in the State of New Jersey. He is a former United States Undersecretary of State. He has been and continues to be active in seeking to influence policymakers and the public on U.S. policy in the Middle East. He writes and speaks widely on this subject. Many of the views he holds and seeks to impart on this subject are opposed to AIPAC's views. The action of the FEC giving rise to this complaint has injured him the manner stated in paragraphs 5-7 above.

(c) Richard Curtiss is a citizen of the United States over the age of 18 years and a registered voter in the State of Maryland. He is a former Chief Inspector of the United States Information Agency. He has been and continues to be active in seeking to influence policymakers and the public on U.S. policy in the Middle East. He is an active member of the Council for the National Interest (hereinafter "CNI"). This organization is a national non-profit membership association organized and registered in the District of Columbia under § 501(c)(4) of the Internal Revenue Code of 1986, as amended. CNI's purposes include organizing of its members in each congressional district to lobby and to communicate with policymakers and the public in favor of a foreign policy in the Middle East that is balanced and supportive of the human, political and territorial rights of all the peoples of the region, including Palestinians

and the other Arab peoples. Many of the views CNI and plaintiff hold and seek to impart are opposed to AIPAC's views. The action of the FEC giving rise to this complaint has injured plaintiff in the manner stated in paragraphs 5-7 above.

(d) Paul Findley is a citizen of United States over the age of 18 years and a registered voter in the State of Illinois. He is a former member of the House of Representatives from the State of Illinois. He is the founder and Chairperson of CNI. In this capacity, and individually, he has been and continues to be active in seeking to influence policymakers and the public on U.S. policy in the Middle East. He writes and speaks often on this subject. Many of the views CNI and plaintiff hold and seek to impart are opposed to AIPAC's views. The action of the FEC giving rise to this complaint has injured plaintiff in the manner stated in paragraphs 5-7 above.

(e) Robert J. Hanks, R. Adm. U.S.N. (Ret.), is a citizen of the United States over 18 years and a registered voter in the State of Virginia. He has been and continues to be active in seeking to influence policymakers and the public on U.S. policy in the Middle East. Many of the views he holds and seeks to impart on this subject are opposed to AIPAC's views. The action of the FEC giving rise to this complaint has injured him in the manner stated in paragraphs 5-7 above.

(f) Andrew I. Killgore is a citizen of the United States over the age of 18 years and a registered voter in the State of Florida. He is a former United States Ambassador. He has been and continues to be active in seeking to influence policymakers and the public on U.S. policy in the Middle East. He is an active member of CNI. Many of the views CNI and plaintiff

hold and seek to impart are opposed to AIPAC's views. The action of the FEC giving rise to this complaint has injured plaintiff in the manner stated in paragraphs 5-7 above.

11. **Defendant:**

The Federal Election Commission is an independent agency of the United States Government and is responsible for the enforcement of the provisions of the Campaign Act.

12. **Other Entity:**

AIPAC is an incorporated, tax-exempt lobbying organization having 50,000 supporters. It lobbies the administration and Congress to maintain a high level of foreign aid to Israel, to limit U.S. aid and sales to Arab countries, and to pursue other policies deem ed in Israel's interest. Because of its ability to influence adversely the election or re-election of any congressional candidate or incumbent who acts or speaks contrary to its views, and, conversely, because of its ability to enhance the election prospects of its favored candidates, AIPAC is one of the most influential lobbying organizations in the United States. A major purpose of AIPAC is to control congressional action by supporting and promising to support election or re-election of members willing to favor AIPAC positions, and by opposing and threatening to oppose election or re-election of those who are not willing to favor AIPAC positions. AIPAC operates a political department which collects and transmits information to AIPAC members and pro-Israel political committees (PACs) concerning current or upcoming campaigns for federal and other

public offices. This information includes candidate position papers, voting records, and publicly available financial information disclosed by others to the FEC. AIPAC's campaign and political activities also include those described in the section below entitled Additional Operative Facts.

STATUTORY AND REGULATORY BACKGROUND

Procedural Statutes

13. 2 U.S.C. § 437g(a)(1) provides that any person who believes that a violation of the Campaign Act has occurred or is about to occur may file a complaint with the FEC. The plaintiffs filed their complaint, Matter Under Review (hereinafter "MUR") No. 2804, pursuant to this provision.

14. 2 U.S.C. § 437g(a)(2) requires the FEC, upon receipt of a properly executed complaint, to conduct an investigation of the allegations raised by the complaint if it finds "reason to believe" that a violation of the Campaign Act has occurred or is about to occur. If the FEC does not find reason to believe a violation occurred or is about to occur it may dismiss the complaint.

15. 2 U.S.C. § 437g(a)(8)(A), (B), and (C) provide that, if the FEC dismisses a complaint filed under 2 U.S.C. § 437g(a)(1), any aggrieved party may file a petition, within 60 days of the dismissal, in the United States District Court for the District of Columbia asking the court (1) to declare the FEC's dismissal of the complaint "arbitrary, capricious, and contrary to law" pursuant to 5 U.S.C. § 706(2), and (2) to direct the FEC to proceed in conformity with such declaration within 30 days.

Substantive Statutes, Regulations and Constitutional Limitations

16. 2 U.S.C. § 431(4) and 11 CFR § 100.5(a) define a political committee to be a "committee, club, association, or other group of persons . . . which makes expenditures aggregating in excess of $1,000 during a calendar year . . . ." This definition, when applied to organizations having as a major purpose the nomination or election of candidates, does not infringe the constitution. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *In the Matter of American Israel Public Affairs Committee*, MUR 2804 (FEC June 16, 1992), General Counsel's Brief, January 30, 1992, at 2.

17. 2 U.S.C. § 431(8)(a)(i) defines the term "contribution" as any gift, subscription, loan, advance, or deposit of money or anything of value made by a person for the purpose of influencing a federal election.

18. 2 U.S.C. § 431(9)(A)(i) defines the term "expenditure" as any purchase, payment, distribution, loan, deposit, or gift of money of anything of value, made by any person for the purpose of influencing a federal election.

19. 2 U.S.C. §§ 433 and 434 provide that, when an organization qualifies as a political committee pursuant to 2 U.S.C. § 431(4), the organization must register and file periodic reports of its receipts and disbursements with the FEC. Regarding organizations that do not meet the definition of a political committee, 2 U.S.C. § 434(c)(1) states that "[e]very person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required

under subsection (b)(3)(A) of this section [concerning identification of contributors] for all contributions received by such person." This provision may be applied to AIPAC without infringing the constitution. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (hereinafter "MCFL").

20. 2 U.S.C. § 441b prohibits corporations, including AIPAC, from making contributions or expenditures in connection with a federal election. It prohibits communications made in cooperation, consultation, or coordination with a candidate which urge support for the candidate or provide campaign assistance. *MCFL* at 249. *Buckley* at 46 n.53 (1976). Internal corporate communications to persons having significant financial or organizational attachment to the corporate structure, however, are excepted from the ban. 2 U.S.C. § 441(b)(2)(A) and (4)(C); *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 204 (1982).

THE FEC PROCEEDINGS

21. Pursuant to the Campaign Act, as amended, 2 U.S.C. § 437g(a)(1), the plaintiffs in this action filed with the FEC an administrative complaint, designated MUR No. 2804, against AIPAC and twenty-seven other PACs (original complaint Exhibit B). The complaint alleged that under the Campaign Act, (1) AIPAC is a political committee; (2) AIPAC and twenty-seven other political committees are affiliated with one another; (3) AIPAC improperly failed to disclose its election-related activity to the FEC; and (4) AIPAC made illegal campaign expenditures.

22. On November 29, 1989, the FEC General Counsel issued the "General Counsel's Report" for MUR

No. 2804. (Original complaint Exhibit C). After evaluating respondents' answer to the complaint, the General Counsel found evidence that members of the twenty-seven PACs have served or are serving as AIPAC officers; that members of some of these PACs had attended AIPAC's annual Policy Conference and received information on candidates' voting records on issues concerning Israel; and that similar patterns of contributions existed among some of the pro-Israel PACs. (Report at 102.) The General Counsel, however, found insufficient evidence to recommend the FEC find reason to believe AIPAC and the twenty-seven PACs are affiliated, because the General Counsel found insufficient evidence that AIPAC established, finances, controls or maintains any of these PACs.

23. On December 19, 1989, the FEC found no reason to believe AIPAC and the PACs were affiliated. The FEC left in abeyance the questions concerning the AIPAC's status as a political committee, its violation of disclosure provisions, and its illegal corporate contributions. (Original complaint, Exhibit D.)

24. The General Counsel investigated these remaining allegations and issued a report, dated May 29, 1992. Although the General Counsel found probable cause to believe AIPAC violated 2 U.S.C. § 441b, regarding illegal corporate expenditures, the General Counsel found no probable cause to believe that AIPAC was a political committee. (Original complaint, Exhibit E.) The General Counsel reached this conclusion by finding that AIPAC's "political activities did not rise to such a level as to make them a major purpose of the organization." MUR 2804 (FEC June 16, 1992), General Counsel's Brief,

January 30, 1992, at 2. In announcing this finding, the General Counsel stated no criteria for determining what level, or type, of political activity meets the "major purpose" standard. Nor did the General Counsel issue a finding stating, under the criteria, what AIPAC's level or type of political activity was. In the absence of articulated criteria and findings thereunder, the General Counsel was unable to state, and thus did not state, the reason why AIPAC's political activity was not a major purpose of the organization. Also, though the value of AIPAC's illegal corporate expenditures clearly exceeded the $250 threshold set by 2 U.S.C. § 434(c), the General Counsel made no finding regarding AIPAC's obligation to file disclosure reports under that provision. The General Counsel's report contains no mention of this requirement.

25. On June 16, 1992, the FEC made a final determination regarding the allegations addressed in the General Counsel's May 29, 1992 report. Adopting without elaboration the General Counsel's conclusion, the FEC found no probable cause that AIPAC was a political committee. The FEC found probable cause that AIPAC violated 2 U.S.C. § 441b, but it took no further action. (Original complaint, Exhibit G.) In its Statement of Reasons, dated July 27, 1992, the FEC held that since the AIPAC situation presented a "close question," and the FEC's own policies regarding exempt internal corporate political communications needed clarification, regulatory proceedings needed to be conducted before penalties would be imposed. (Original complaint, Exhibit F.) The FEC did not mention AIPAC's obligation to file reports disclosing its political activities and sources of funds under 2 U.S.C. § 434(c).

ADDITIONAL OPERATIVE FACTS

26. AIPAC sent internal memos to pro-Israel PACs which indicate that AIPAC was actively involved with trying to help raise money for several candidates in congressional elections. (Original complaint, Exhibits A-2 and A-10.)

27. In 1986 the Pro-Israel PACs donated nearly $7 million to candidates, sometimes more than $200,000 to a single candidate. (Original complaint, Exhibit A-3).

28. Upon information and belief, according to a computer-aided analysis of the 1986 FEC reports, no fewer than 51 pro-Israel PACs are operated by AIPAC officials or people who hold seats on AIPAC's two major policy-making bodies. (Original complaint, Exhibit A-5).

29. AIPAC regularly holds political leadership development program workshops to instruct pro-Israel groups in PAC formation and fund-raising. (Original complaint, Exhibit A-13).

30. Officers of the pro-Israel PACs often consult AIPAC about candidates' voting records, and many members of AIPAC sit on the boards of those committees. (Original complaint, Exhibit A-17).

31. AIPAC has made corporate contributions and expenditures in federal election campaigns in excess of $5,000.

CAUSE OF ACTION 1 - FAILURE TO DEEM AIPAC A POLITICAL COMMITTEE AND INADEQUATE FINDINGS, REASONS AND INVESTIGATION AS TO THIS ISSUE

32. Plaintiffs reallege paragraphs 1-31.

33. The FEC's decision that AIPAC is not a political committee is contrary to law. The existing record shows both that AIPAC's political activities meet the statutory definition of a political committee and that a major purpose of the organization is to control congressional action by influencing, and promising or threatening to influence, congressional elections. AIPAC therefore is properly subject to the registration and disclosure requirements of 2 U.S.C. §§ 433 and 434. The FEC's statement that AIPAC's "political activities did not rise to such a level as to make them a major purpose of the organization" misconstrues the "major purpose" standard of *Buckley v. Valeo*. Under *Buckley*, an organization is a political committee if (a) it has as a major purpose the influencing of federal elections and (b) its campaign expenditures or contributions are above the monetary level set by Congress, $1,000. Whether a major purpose of an organization is to influence federal elections is not determined merely by its level of campaign spending, expressed as either an absolute amount or a percentage of its total budget. An organization's major purposes are determined by the type and intent of its activities viewed as a whole. If a major purpose of an organization, as revealed by the type and intent of its activities, is to influence congressional elections, the organization must register as a political committee if the monetary level of its election expenditures or contributions exceeds the $1,000 statutory threshold. The existing record

shows AIPAC meets both aspects of the applicable legal test.

34. In addition, the FEC's decision is arbitrary and capricious, and therefore in violation of § 437g(a)(8), because the Commission (a) failed to state criteria for determining, under the *Buckley* test, an organization's major purposes; (b) failed to make findings under those criteria regarding the AIPAC; and (c) consequently failed to state a sufficient reason for not finding AIPAC to be a political committee.

35. The existing record contains sufficient evidence to support a finding under the proper legal standard that AIPAC is a political committee, but it is also true that the FEC investigation failed to seek additional readily available evidence that would make this conclusion even more compelling. Therefore, if, contrary to our view, the evidence of record is determined insufficient to show AIPAC is a political committee, the insufficiency of the evidence is the result of the inadequacy of the FEC's investigation. The FEC's investigation was inadequate, and therefore arbitrary and capricious, because it was unguided by proper criteria for identifying the major purposes of an organization under the *Buckley* test. It did not focus, and therefore did not seek additional readily available evidence, on the type and intent of AIPAC's activities, viewed as a whole. Nor did it gather additional readily available evidence on the magnitude and impact of those activities. Most of the evidence gathered by the FEC was obtained for a narrow purpose—to assess whether AIPAC is affiliated with acknowledged pro-Israel political committees. In addressing this question the FEC did gather evidence indicating the type, intent, magnitude, and impact of AIPAC's activities, but the FEC's focus was on

whether the stringent legal standard for affiliation was met. It did not elaborate and focus on the question of AIPAC's major purposes, in order to apply properly the *Buckley* test. Consequently, additional readily available evidence relevant to this latter question was not sought or obtained.

CAUSE OF ACTION 2, IN THE ALTERNATIVE - FAILURE TO REQUIRE AIPAC'S COMPLIANCE WITH, OR EVEN TO ADDRESS AIPAC'S VIOLATION OF, DISCLOSURE OBLIGATIONS IMPOSED BY 2 U.S.C. § 434(c)

36. Plaintiffs reallege paragraphs 1-31.

37. The FEC's failure to find that AIPAC was obliged to comply with the disclosure provisions of 2 U.S.C. § 434(c) was—in light of the evidence showing AIPAC political expenditures well in excess of that provision's $250 threshold—contrary to law. This provision applies to organizations not deemed to be political committees. Plaintiffs' claim under this provision is alternative to their first cause of action.

38. In addition, and also alternatively to plaintiffs' first cause of action, the FEC's failure to issue any findings and reasons at all with respect to AIPAC's obligation to comply with the disclosure provisions of 2 U.S.C. § 434(c) was—in light of the evidence showing AIPAC political expenditures well in excess of that provision's $250 threshold—arbitrary and capricious, and therefore in violation of § 437g(a)(8).

RELIEF

39. Plaintiffs ask the Court to

a. assume jurisdiction of this case;

b. declare the FEC's decision that AIPAC is not a political committee to be contrary to law and arbitrary and capricious, remand the matter to the FEC, and order the agency to remedy the deficiencies in its investigation and decision of this question;

c. in the alternative to 39.b., declare the FEC's failure to find AIPAC obligated to comply with the disclosure provisions of 2 U.S.C. § 434(c) to be contrary to law and arbitrary and capricious, remand the matter to the FEC, and order the agency properly to address this question;

d. award plaintiffs their costs and attorneys' fees;

e. afford plaintiffs such additional or alternative relief as the Court deems just.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92-1864 (CRR)

JAMES E. AKINS, ET AL., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

ANSWER TO FIRST AMENDED COMPLAINT

PLAINTIFF FEDERAL COMMISSION'S ANSWER TO FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendant Federal Election Commission (the "Commission"), through its undersigned counsel, responds as follows to the first amended complaint in this litigation:

I. Answering specifically the allegations of the first amended complaint, the Commission responds to the particular paragraphs thereof as follows:

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. ADMIT.
2. DENIED.
3. ADMIT that the Commission found no probable cause to believe that the American Israel Public

Affairs Committee ("AIPAC") violated 2 U.S.C. §§ 433 and 434, and, therefore, AIPAC was not required to register as a political committee and report "the sources of its money and all campaign expenditures and contributions." ADMIT that the Commission found probable cause to believe that AIPAC violated 2 U.S.C. § 441b but determined to take no further action and to close the file.

4. DENIED.

5. The Commission is without knowledge or information sufficient to for a belief as to the plaintiffs' injury, if any, as a result of the Commission's finding of no probable cause to believe that AIPAC violated 2 U.S.C. §§ 433 and 434. The Commission is without knowledge or information sufficient to form a belief as to whether the plaintiffs "are politically active persons who, individually or as members of organizations, oppose AIPAC views on U.S. foreign policy in the Middle East." The Commission is without knowledge or information sufficient to form a belief as to whether the plaintiffs "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers and the public." DENY that the Commission's action on the plaintiffs' administrative complaint "has given AIPAC an illegal advantage in this competition." DENY that the Commission's action on the plaintiffs' administrative complaint "has enabled AIPAC to supplement its political lobbying with unreported campaign expenditures derived from secret sources."

6. DENY that the Commission's action on the plaintiffs' administrative complaint "has deprived plaintiffs of their legal right to learn the sources, amounts, and beneficiaries of AIPAC'S unreported campaign expenditures." The Commission has no

knowledge whether "[t]he unavailability of this information to plaintiffs impedes their efforts to show legislative and executive policymakers and the public that AIPAC's great influence on U.S. foreign policy stems not from the merits of its views but principally from its ability to wield enormous financial power, through means including campaign spending."

7. DENIED.

JURISDICTION AND VENUE

8. DENY that 28 U.S.C. § 1331 confers subject matter jurisdiction in this litigation, but ADMIT that this Court has statutory jurisdiction under 2 U.S.C. § 437g(a)(8)(A) to review the Commission's dismissal of the allegations contained in the plaintiffs' administrative complaint.

9. ADMIT.

PARTIES

10(a)-(f). The Commission is without knowledge or information sufficient to form a belief as to the information contained in paragraphs 10(a)-(f).

11. ADMIT.

12. ADMIT that AIPAC is an incorporated, tax-exempt lobbying organization which is reported to have approximately 50,000 supporters. ADMIT that AIPAC lobbies the administration and Congress and communicates with its supporters. The Commission is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 12.

STATUTORY AND REGULATORY BACKGROUND

Procedural Statutes

13-15. Paragraphs 13, 14 and 15 contain plaintiffs' conclusions of law as to which no response is required since those statutory provisions speak for themselves.

Substantive Statutes, Regulations and Constitutional Limitation

16-20. Paragraphs 16 through 20 contain plaintiffs' conclusions of law as to which no response is required since those statutory provisions and reported case decisions speak for themselves.

THE FEC PROCEEDINGS

21. ADMIT that the plaintiffs filed an administrative complaint, designated as Matter Under Review ("MUR") 2804. As to the plaintiffs' characterization of the administrative complaint, no response is necessary as that document speaks for itself.

22. ADMIT that on November 29, 1991, the Office of the General Counsel of the Commission issued a General Counsel's Report (Plaintiffs' Exhibit C to the Original Complaint) in MUR 2804. ADMIT that the General Counsel recommended that the Commission find no reason to believe that AIPAC and twenty-seven political action committees violated 2 U.S.C. § 441(a)(2)(A) by reason of affiliation. As to the plaintiffs' characterization of that report, no response is necessary as that document speaks for itself.

23. ADMIT that on December 19, 1989, the Commission found no reason to believe that AIPAC

violated 2 U.S.C. § 441a(a)(2)(A) by reason of affiliation. As to the plaintiffs' characterization of the Commission's Certification (Plaintiffs' Exhibit D to the Original Complaint), no response is necessary as that document speaks for itself.

24. ADMIT that on May 29, 1992, the Office of the General Counsel issued a General Counsel's Report in MUR 2804 recommending that the Commission find no probable cause to believe that AIPAC violated 2 U.S.C. §§ 433 and 434 and that the Commission find probable cause to believe that AIPAC violated 2 U.S.C. § 441b. As to the plaintiffs' characterization of that report (Plaintiffs' Exhibit E to the Original Complaint), no response is necessary as that document speaks for itself.

25. ADMIT that on June 16, 1992, the Commission found no probable cause to believe that AIPAC violated 2 U.S.C. §§ 433 and 434. ADMIT that on that same date, the Commission found probable cause to believe that AIPAC violated 2 U.S.C. § 441b but determined to take no further action and to close the file. As to the plaintiffs' characterization of the Commission's Certification (Plaintiffs' Exhibit G to the Original Complaint), no response is necessary as that document speaks for itself. ADMIT that on July 27, 1992, four Commissioners issued a Statement of Reasons in connection with MUR 2804. As to the plaintiffs' characterization of that Statement of Reasons (Plaintiffs' Exhibit F to the Original Complaint), no response is necessary as that document speaks for itself.

ADDITIONAL OPERATIVE FACTS

26. DENY that the administrative record establishes that "AIPAC sent internal memos to pro-Israel PACs which indicate that AIPAC was actively involved with trying to help raise money for several candidates in congressional elections." ADMIT that AIPAC circulated an internal memorandum dated September 30, 1986 to its staff (Plaintiffs' Exhibit A-2 to the Original Complaint) and an internal memorandum dated November 3, 1987 to its staff (Plaintiffs' Exhibit A-6 to the Original Complaint). As to the plaintiffs' characterization of these memoranda, these documents speak for themselves, and therefore, no further response is necessary.

27. DENY that the administrative record established that "[i]n 1986 the Pro-Israel PACs donated nearly $7 million to candidates, sometimes more than $200,000 to a single candidate."

28. ADMIT that the plaintiffs alleged in their administrative complaint that "according to a computer-aided analysis of the 1986 FEC reports, no fewer than 51 pro-Israel PACs are operated by AIPAC officials or people who hold seats on AIPAC's two major policy-making bodies." However, the Commission is without knowledge or information sufficient to form a belief as to whether this allegation is true.

29. DENY that the administrative record establishes that "AIPAC regularly holds political leadership development program workshops to instruct pro-Israel groups in PAC formation and fund-raising." ADMIT that AIPAC conducts political education seminars and workshops for people that AIPAC

claims to be its members at its annual policy conferences.

30. DENY that the administrative record establishes that "[o]fficers of the pro-Israel PACs often consult AIPAC about candidates' voting records, and many members of AIPAC sit on the boards of those committees." ADMIT that AIPAC communicates with some people that AIPAC claims to be its members about the voting records and positions of incumbent members of Congress. ADMIT that some people that AIPAC claims to be its members also participate in political committees.

31. DENY that the administrative record established that "AIPAC has made corporate contributions and expenditures in federal election campaigns in excess of $5,000."

CAUSE OF ACTION 1 - FAILURE TO DEEM AIPAC A POLITICAL COMMITTEE AND INADEQUATE FINDINGS, REASONS AND INVESTIGATION AS TO THIS ISSUE

32. The Commission incorporates by reference its response to paragraphs 1 through 31.

33. DENY that the Commission's finding that AIPAC did not qualify as a political committee within the meaning of the Federal Election Campaign Act of 1971, as amended, is contrary to law. DENY that the administrative record established "both that AIPAC's political activities meet the statutory definition of a political committee and that a major purpose of the organization is to control congressional action by influencing, and promising or threatening to influence, congressional elections." DENY that AIPAC is subject to the registration and disclosure requirements of 2 U.S.C. §§ 433 and 434. The remaining

allegations in paragraph 33 contain plaintiffs' conclusions of law to which no response is necessary since *Buckley v. Valeo*, 424 U.S. 1 (1976), speaks for itself.

34. DENIED.

35. DENIED.

CAUSE OF ACTION 2, IN THE ALTERNATIVE - FAILURE TO REQUIRE AIPAC'S COMPLIANCE WITH, OR EVEN TO ADDRESS AIPAC'S VIOLATION OF, DISCLOSURE OBLIGATIONS IMPOSED BY 2 U.S.C. § 434(c)

36-38. No answer to paragraphs 36 through 38 is required since this cause of action has already been dismissed.

II. Defendant further DENIES all allegations in the complaint not heretofore admitted or denied, or to which defendant has not otherwise specifically responded, and pleads as an affirmative defense that the allegations fail to state a claim upon which relief can be granted.

Respectfully submitted,

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LAWRENCE M. NOBLE
General Counsel
(D.C. Bar # 244434)

/s/ RICHARD B. BADER
RICHARD B. BADER
Associate General Counsel
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/s/ STEPHEN E. HERSHKOWITZ
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/s/ FRANCISZKA A. MONARSKI
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August 31, 1993

FOR THE DEFENDANT
FEDERAL ELECTION
COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 2804
American Israel Public Affairs Committee	)	
	)	

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter was initiated by a complaint filed on January 12, 1989, by James E. Akins, George Ball, Richard Curtiss, Paul Findley, Robert J. Hanks, Rear Admiral Andrew I. Killgore (Ret.), and Orin Parker. On December 19, 1989, the Commission found no reason to believe AIPAC violated 2 U.S.C. § 441a(a)(2)(A) on the affiliation allegation. At the same time, the Commission found reason to believe that the American Israel Public Affairs Committee ("AIPAC") violated 2 U.S.C. § 433, 434 and 441b based on activities conducted in connection with federal elections. Regarding these alleged violations, the Commission initiated an investigation in which it posed numerous interrogatories and requests for documents to the Respondents and to other witnesses as well as collecting and reviewing information filed with the Commission by federal political committees. On October 30, 1990, the Commission found no reason to believe AIPAC violated any provision of the Act on the basis of the amended complaint filed on July 23, 1990.

II. FACTUAL AND LEGAL ANALYSIS

The allegations and investigation in this matter relate to AIPAC's direct and indirect support or assistance to candidates for federal office, particularly through its communications to encourage its own contributors and supporters to financially assist federal candidates. The latter issue also raises the questions whether AIPAC's contributors and supporters are "members" of AIPAC as that term is defined for purposes of the Federal Election Campaign Act of 1971, as amended, ("the Act") and, if not, whether AIPAC meets the requirements set out in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*") for exemption to the Act's prohibition on corporate expenditures in connection with a federal election.

As set forth in this brief, the General Counsel concludes that AIPAC's contributors and supporters do not qualify as members of AIPAC for purposes of the Act and that AIPAC does not meet the requirements of *MCFL* for exemption from the Act's prohibition on corporate expenditures. Furthermore, the General Counsel concludes that AIPAC has made, in cooperation, consultation, or coordination with federal candidates, communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns. In the General Counsel's view, there is probable cause to believe these activities violate the Act's prohibition on corporate contributions. Thus, the General Counsel recommends that the Commission find probable cause to believe AIPAC has violated 2 U.S.C. § 441b. Because AIPAC's political activities did not rise to such a level as to make them

a major purpose of the organization, the General Counsel recommends that the Commission find no probable cause to believe that AIPAC has become a political committee through its activities.

A. The Act and Regulations

Pursuant to 2 U.S.C. § 431(4), the term "political committee" refers to any committee, club, association, or other group of persons which receives contributions or makes expenditures aggregating in excess of $1,000 during a calendar year. The term "contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing a federal election. 2 U.S.C. § 431(8)(A)(i). Pursuant to the Act, "expenditure" includes any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing a federal election. 2 U.S.C. § 431(9)(A)(i). When an organization qualifies as a political committee pursuant to 2 U.S.C. § 431(4), the organization must register and file periodic reports of its receipts and disbursements with the Commission. 2 U.S.C. §§ 433 and 434.

The Act prohibits any corporation from making contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b. Pursuant to section 441b, the term "contribution or expenditure" includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services or anything of value to any candidate, campaign committee, or political party or organization in connection with a federal election. 2 U.S.C. § 441b(b)(2).

In *MCFL*, the Supreme Court stated that "an [independent] expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249. The Supreme Court had, however, earlier recognized that expenditures coordinated with candidates or their committees are treated as in-kind contributions. *Buckley v. Valeo*, 424 U.S. 1, 46 n.53 (1976) ("*Buckley*").[1] The Supreme Court has defined "express advocacy" to include "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.' *Buckley*, 424 U.S. at 44 n.52. The Court later said this requirement sought to "distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *MCFL*, 479 U.S. at 249.

The Act excludes communications by a corporation to its stockholders and executive personnel and their families on any subject from the definition of contribution or expenditure. 2 U.S.C. § 441b(b)(2)(A). Moreover, Commission Regulations permit an incorporated membership organization, incorporated trade

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[1] The United States Court of Appeals for the First Circuit relied on the statements in *MCFL*, requiring express advocacy for an expenditure to be prohibited, in holding invalid a Commission regulation at 11 C.F.R. § 114.4(b)(5)(i) relating to voter guides. *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991) ("*Faucher*"). The Commission filed a petition for a writ of certiorari with the Supreme Court seeking review of the *Faucher* decision's finding with respect to 2 U.S.C. § 441b. On October 7, 1991, the Supreme Court denied the petition. Consequently, the Commission decided to acquiesce to the courts' rulings requiring express advocacy for an independent expenditure to be prohibited by Section 441b.

association, incorporated cooperative or corporation without capital stock to communicate with its members and executive or administrative personnel. 11 C.F.R. § 114.3(a)(2).[2]

If a membership organization makes a communication to its members expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the election of a clearly identified candidate), the organization must report the costs directly attributable to such communication to the Commission if such costs exceed $2,000 for any election. 11 C.F.R. §§ 100.8(b)(4) and 104.6.

The Commission has also said that incorporated entities may communicate with their restricted classes and recommend contributions be made to specific federal candidates as long as the corporation does not act as a conduit or intermediary for earmarked contributions or facilitates the making of contributions to federal candidates, such as by providing envelopes addressed to such candidates. See, Advisory Opinions 1982-2 and 1987-29.

The Regulations define "members" as "all persons who are currently satisfying the requirements for membership in a membership organization . . . or

[2] The regulation implies that some degree of coordination, consultation, or cooperation with the candidate is permissible when an organization is making an internal communication to its members, especially regarding candidate appearances. As the regulation makes clear, however, the degree of coordination, consultation, or cooperation implied by the regulation does not permit an organization to copy the candidate's campaign materials and distribute them to its restricted class. *See, e.g., Republican National Committee v. FEC*, 487 F. Supp. 280 (S.D. N.Y. 1980) (three-judge panel).

corporation without capital stock." 11 C.F.R. § 114.1(e). In *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("*NRWC*"), the United States Supreme Court considered whether the National Right to Work Committee, a nonprofit corporation without capital stock, was limited in soliciting funds to its "members." The Court stated that section 441b limits solicitation by nonprofit corporations to "those persons attached in some way to it by its corporate structure." *Id.* at 202. The Court went on to note that members of a nonstock corporation were "to be defined, at least in part, by analogy to stockholders of business corporations and members of labor unions." *Id.* at 204. The Court further stated that the analogy to stockholders and union members "suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under [2 U.S.C.] § 441b(b)(4)(C)." *Id.* In determining this issue, the Court noted that it was permissible for the Commission to look to the corporate charter and bylaws. *Id.* at 205. In *NRWC*, the Court determined that "those solicited were insufficiently attached to the corporate structure of NRWC to quality as 'members'" under 2 U.S.C. § 441b(b)(4)(C) because NRWC's Articles of Incorporation disclaimed the existence of members; the solicitation letters made "no reference to members"; members played "no part in the operation or administration of the corporation"; members did not elect corporate officials; there were no membership meetings; and, there was no indication that the asserted members exercised any control over the expenditure of their contributions.

B. AIPAC's Activity Regarding Federal Candidates and PACs

The complaint makes numerous wide-ranging and disjointed allegations that AIPAC has provided support to federal candidates. These allegations focus primarily on AIPAC's policy conference, political workshops, meetings with candidates to discuss their campaigns and their views of Middle East issues, targeting of candidates for support or defeat, and efforts to make its preferences known to its supporters (especially those who are associated with a pro-Israel political action committee or are fundraisers for a candidate). The allegations also focus on AIPAC's alleged efforts to encourage contributions to favored candidates as well as other forms of fundraising assistance or campaign support.

AIPAC contends that once the complaint is stripped of its conclusions of law, the remaining factual assertions that meet the requirement of 11 C.F.R. § 111.4 describe "nothing more than permissible and constitutionally protected internal communications of a non-profit membership organization." AIPAC has also generally attacked many allegations in the complaint as offering "little more than an unfocused recitation of usually unattributed news stories, augmented by a methodologically unsound analysis of selective data.[3]

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[3] AIPAC's responses to many allegations consist of its assertion that the complaint does not meet the requirements of the regulations that statements not based on personal knowledge should be accompanied by identification of the source of the information. See 11 C.F.R. § 111.4(d)(2). We note that the use of the word "should" indicates that this provision urges complainants to include such information but does not require them to do so in order to file a valid complaint. The absence of such information, however, has been considered in assessing the weight or credibility to be given to such information.

1. AIPAC's Organization

AIPAC is an incorporated organization that is tax exempt as a 501(c)(4) lobbying organization. Its staff is organized into a legislative department, a foreign policy issues department, a development department, a finance department, and a political department.

According to AIPAC's response, the Political Department "helps to educate candidates running for public office as well as AIPAC members." The department's professional staff "monitor Senate and House campaigns, seek to familiarize candidates with the views of the Jewish community, and provide them with current information about the U.S.-Israel relationship." According to AIPAC, its Political Department "collects and makes available to AIPAC members information about current or upcoming campaigns for federal and other public offices." This information "may include candidate position papers, voting records and publicly available information such a public polling data, and summaries of financial information disclosed in filings with the Federal Election Commission." This information "is usually distributed to AIPAC members in a summaries report known as 'Campaign (Year): Senate and House Update,' on a monthly and annual basis." AIPAC provided copies of its 1987 and 1988 updates.

2. The Policy Conferences and Political Workshops

AIPAC's main event each year is its Policy Conference in Washington, D.C., where its policy for the next year is set and where there are speeches and other appearances by Members of Congress as well as political seminars and workshops. With regard to the Policy Conference, the complaint states:

> AIPAC also plays a role in coordinating the distribution of funds raised by the respondents and other pro-Israel PACs. For example, at the 1983 Policy Conference AIPAC officials stressed the importance of linking contributions by out of state PACs to local constituents. They informed those in attendance that once the PACs had raised funds AIPAC would "find a local pro-Israeli constituent to make the contribution since this better insures 'access' than out of district money." Exhibit 11 at 4-5. At the same conference, AIPAC members were told that they were "supposed to report all contributions to the organization so that, although AIPAC itself never contributes, its lobbyists can later say to the politician 'we were responsible for you receiving X amount of dollars' in the last campaign." *Id.*

. . . .

> Workshops at the 1984 Policy Conference featured nationally-renowned specialists on campaign polling and media. Emphasis was placed on the importance of increased funding to pro-Israel contenders, particularly Rep. Paul Simon and Gov. James Hunt, who were running against

> Senators Charles Percy and Jesse Helms, respectively. Exhibit 13 at 5. Panelists also noted with concern the apparent re-election difficulties of Senators Rudy Boschwitz (R-MN) and Carl Levin (D-MI). *Id.* A packet of information which covered all of the 1984 races was distributed to the members along with an appeal for them to become active. *Id.* at 6.
>
> At the 1988 Policy Conference, AIPAC actively targeted members of Congress for election or defeat. Using a "key race system" AIPAC endorsed candidates based on three factors: 1) whether he or she was a member of the four key congressional committees (Appropriations, Budget, Foreign Affairs and Armed Services); 2) the member's legislative record on pro-Israeli issues, and 3) the likelihood of success of the member's reelection effort. Exhibit 14 at 6.
>
> AIPAC's list of vulnerable pro-Israel House incumbents for 1988 included the following:
>
> Samuel Gejdenson (D-CT-2)
> Jack Davis (R-IL-4)
> Vin Weber (R-MN-2)
> Mike Espy (D-MS-2)
> James McClure Clark (D-NC-11)
> Wayne Owens (D-UT-2)
> John Miller (P-WA-1)
>
> AIPAC's list of vulnerable anti-Israel House incumbents included the following:
>
> Ron Marlenee (R-MT-2)
> Robert Davis (R-MI-11)

AIPAC's list of vulnerable pro-Israel Senate incumbents included Howard Metzenbaum (D-OH), Frank Lautenberg (D-NJ) and David Durenberger (R-MN). AIPAC listed John Chafee (R-RI) as a vulnerable anti-Israel Senate incumbent. See Exhibit 14 at 7.

The three exhibits attached to the complaint purport to be typed reports from the 1983, 1984, and 1988 AIPAC Policy conferences, though there is no evidence verifying the author or the source of these documents or their authenticity or credibility.

The putative report of the 1983 conference noted that AIPAC officials took partial credit for the defeat of Paul Findley and that AIPAC staffers were "bellicose" about the fate of Senator Charles Percy in 1984, promising the same treatment against him as Findley received. The document noted that there was little attention given to the 1984 presidential race with nearly all of the attention focused on congressional races. It added that in 1982, 300 candidates solicited campaign support from AIPAC. AIPAC staffers stated they were interested in helping candidates who are (1) incumbents on key committees or with influence on other election officials; (2) representatives headed for the Senate; and (3) state officials with congressional ambitions. The document outlined some of the criteria AIPAC used to rate candidates, with a strong emphasis on travel to Israel.

The document also quoted advice reportedly given by Lynn Cutler, then vice chair of the DNC, on gaining influence with political parties. She reportedly noted the need of the Democratic Party for money and urged AIPAC members to contribute and ask for delegate status to the national convention.

Reportedly, a similar message was conveyed by Mitch Daniels of the National Republican Senatorial Committee, though according to the document without as prominent a "for sale" sign. The conference also put emphasis on Senate races over House races and urged Jewish candidates to seek districts with large Jewish populations and urged Jewish contributors to concentrate on districts with low Jewish populations. This exhibit also states that "the only fundraisers held alongside the conference were for Boschwitz, Durbin, Levin, and Cranston."

According to the putative report of the 1984 conference, panelists at a Campaign '84 workshop illustrated the impact of media by citing Senator Helms' $50,000 per week television budget and the National Association of Arab American's radio and billboard campaign against Rep. Clarence D. Long (D-MD). A tape of NAAA's ad was played, eliciting a negative response from the audience. A portion of the document allegedly covering the 1988 conference, includes a discussion of the presidential race by AIPAC executive director Tom Dine. It attributes to David Gillette, political liaison for AIPAC, a comment that Rep. Marlenee is "one of the last Arabists" in Congress. Jill Buckley, a political consultant, reportedly identified Senators Metzenbaum, Lautenberg, and Durenberger as three incumbents AIPAC would help to re-elect, while targeting Senator Chafee for defeat.

In response, AIPAC claims the allegation that AIPAC coordinates the distribution of funds raised by out-of-state Jewish PACs[4] by linking the con-

[4] The reference to "Jewish PACs" is also intended to refer to pro-Israel PACs. The term "Jewish PACs" has been used by

tributions to a local AIPAC constituent is "false." It further challenges the complaint's use of the "supposed" notes of an "unidentified alleged attendee" at a 1983 policy conference as having "questionable authenticity and accuracy" as well as failing to meet the standards of the regulations. AIPAC claims that for the Commission to give any weight to such notes would invite a wholesale abuse of the complaint process.

Moreover, AIPAC claims that the complaint misrepresents what actually appears in the document. It points out that the memorandum "makes no reference to any discussion of Jewish PACs that occurred at the AIPAC Policy Conference, let alone coordination of Jewish PAC contributions." Instead, AIPAC states that the memorandum "refers only to supposed contributions by AIPAC members, and only in the context of AIPAC encouraging its members to be sophisticated when making political contributions." AIPAC said that without identification of who made such a statement, it is not possible to further respond.

AIPAC contends that it "expressly prohibits any candidate from holding fundraising events at any Policy Conference meeting or in any room reserved for Policy Conference functions." It adds that to the best of its knowledge, no candidates have held fundraising events at its Policy Conferences. It notes that it "has never sold tickets for nor publicized such events in its Policy Conference material." AIPAC acknowledges that at the annual Policy Conference it "does control a portion of the meeting space at the host hotel" which "is utilized by AIPAC to conduct

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AIPAC in some of its responses. Where this term has been used in the responses, the term is also used in this brief.

meetings related to the affairs of the convention." It states that "[c]andidates and their representatives are prohibited from holding fundraisers in any of this meeting space." AIPAC adds that no candidate who spoke at the Policy Conference held a fundraiser at it. The General Counsel has examined the reports filed by the principal campaign committees of Senators Boschwitz, Cranston and Levin and Representative Durbin for the periods before and after the 1983 Policy Conference. The receipts and disbursements disclosed in these reports do not indicate any fundraising event around the time of the 1983 Policy Conference. Furthermore, Rep. Durbin's campaign committee has stated that it did not hold any fundraising event in conjunction with the 1983 AIPAC Policy Conference.

In a supplemental response, AIPAC also submitted an affidavit from David Gillette, who had been a political liaison employee in 1988 and is now political outreach director for AIPAC. He states that his position includes "frequent political briefings of AIPAC members." He adds:

> These briefings generally included information about candidates and their positions on issues relevant to AIPAC as well as political analyses of competitive campaigns, such as open seats or seats held by incumbents who had close races in their previous elections. I consistently advised AIPAC members at these meetings that their participation in political campaigns could take a number of forms, such as volunteering in a campaign, registering voters, or contributing to campaigns. At no time, however, did I ever advise AIPAC

members to vote for, endorse or contribute to a specific candidate for federal office.

He states that he gave such a briefing at the 1988 AIPAC Policy Conference "at a political workshop which [he] announced prior to beginning [his] talk was a private briefing limited to AIPAC members." He adds that he did not "announce, distribute, describe or in any way communicate a list, either orally or in writing of candidates supported or opposed or targeted by AIPAC." He notes that he told persons at the briefing that AIPAC does not support or endorse candidates and asserts that he did not urge any one to vote for any candidate or contribute to any candidate. He states that his briefing was followed by presentations by Jill Buckley and Doug Bailey, who he describes as independent political consultants invited to appear to give AIPAC members "an objective political analysis of the 1988 races." He avers that Ms. Buckley never stated that AIPAC had targeted or would help re-elect certain Senate candidates or distributed any list of candidates supported or opposed or targeted by AIPAC.

AIPAC further adds that the 1988 Policy Conference had three political education seminars. The first one examined the internal working of a political campaign from the perspective of a political consultant and a campaign manager. The second one addressed the role of women in politics. The third one presented an overview of "Campaign '88." AIPAC states that prior to the third seminar, "a statement was made that AIPAC neither rates nor endorses candidates." In 1989 Lee Atwater and Governor Bill Clinton addressed the Policy Conference on the importance of political activism at the grassroots

level. Following these speeches, attendees separated into smaller regional groups to hear panelists discuss the need for individuals to participate in the political process. Information sheets listing state party chairpersons, executive directors and their addresses and phone numbers along with a state listing of elected officials were distributed to workshop attendees. Also, a survey was distributed requesting participants to list and describe the relationship, if any, they had with any Members of Congress.

In 1990, Governor Tommy Thompson and Governor Douglas Wilder addressed the Policy Conference on the importance and efficacy of grassroots political activism to the U.S. - Israel relationship. There were three earlier seminars. One dealt with countering anti-Israel propaganda. The second with media coverage in the Middle East. And the third one discussed grassroots politics in detail. Panel participants included Kate Michelman, Grover Norquist, and Steve Gutow, who each presented a case study on citizen participation in politics. At both the 1989 and 1990 Policy Conferences, two briefings on federal campaigns (identical in content and agenda) also took place. AIPAC contends that prior to both briefings, its general counsel stated that "as a matter of policy, AIPAC neither rates nor endorses candidates for office, nor can it, as a matter of law, contribute to federal election campaigns." According to AIPAC, each briefing reviewed the public information (polling data, fundraising figures, challengers and voting records) available for each Senate race, which was followed by a short analysis of competitive House races. Each participant received a booklet of information on the races discussed, known as the Campaign Update or the "black book."

The complaint notes that AIPAC officials have compared AIPAC's operations to those of the AFL-CIO's COPE and has focused on the political workshops AIPAC regularly conducts. The complaint specifically states:

> In addition to making contributions and expenditures in connection with federal elections, AIPAC, like COPE, directs a substantial portion of its resources to programs whose purpose is to involve pro-Israel activists in the political process and in support of specific candidates. This purpose is realized in a variety of ways that constitute a full range of PAC activities. The activities . . . include providing help to start pro-Israel PACs, providing those PACs with assistance concerning organization and operation, encouraging AIPAC members' involvement in support of "acceptable" candidates, and instructing them in candidate support techniques. These activities also provide a means through which AIPAC can maintain contacts with the pro-Israel PACs.

. . . .

> Elizabeth Schrayer, AIPAC's political director, sent letters to various pro-Israel individuals containing fundraising ideas and offering to arrange speakers for a new pro-Israel PAC and to answer questions about starting a PAC. . . . A "how-to" booklet on setting up a pro-Israel PAC, dated February 1985, was available in Schrayer's office, according to a former AIPAC employee.

. . . .

> . . . [I]t is known that at the 1983 Policy Conference, AIPAC ran a series of nuts and bolts political action seminars, many of them moderated by officials of various pro-Israel PACs. Steven J. Rosen, AIPAC's Director of Research and Development, hosted the Political Action panel and discussed the AIPAC Political Leadership Development program, which holds workshops across the country to instruct more than 5,000 affiliated student members in techniques for political action and PAC fundraising.

AIPAC again points out the difficulty of responding to the allegation that an anonymous AIPAC officer compared AIPAC with the AFL-CIO COPE. AIPAC asserts that the Constitution and the Act permit membership organizations, such as AIPAC and AFL-CIO, to freely engage in communications disseminating political information and encouraging members' involvement in political campaigns.

Moreover, AIPAC asserts that the "development of Jewish PACs occurred simultaneously with the growth of PACs in the United States generally." It adds that there has been a debate within AIPAC itself over the desirability and effectiveness of PACs relating to issues involving Israel. It points out that the Jewish community is large and diverse and that knowledge of PACs did not emanate from AIPAC or any single organization. Instead, AIPAC notes that "PACs simply emerged from a debate among sophisticated Jewish activists as to whether to utilize a mechanism for political participation established by Congress and used by many other groups to promote

their views, including Arab-Americans." AIPAC further notes:

> Since its founding in 1954, AIPAC has encouraged its members to participate in all aspects of the political process. Historically, this has included lobbying members of Congress and participating in all aspects of campaigns from stuffing envelopes to making individual financial contributions to a member's candidate of choice.

Furthermore, AIPAC denies that it ever had a policy of practice of establishing, maintaining, controlling, or financing any political action committee.[5] AIPAC specifically notes the allegation that "a pro-Israel political action committee was organized in Virginia in 1983 during a workshop sponsored by AIPAC." It contends that there is "no proof of the event, because it never happened." AIPAC further challenges this allegation for lack of proof other than a passage in Rep. Findley's book.[6]

AIPAC also takes issue with the lack of evidence regarding the allegations that AIPAC has assisted Jewish PACs by sponsoring political education or action seminars at its policy conferences and distributing information to AIPAC members about federal election races. AIPAC provides an affidavit from Thomas Dine that states:

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[5] In support of its position on this issue, AIPAC submitted affidavits from several AIPAC officials, past and present.

[6] The data base shows a pro-Israel PAC called Virginia Congressional Committee in Richmond, Virginia. It first filed its Statement of Organization with the Commission on December 30, 1985.

> As part of AIPAC's grass-roots educational efforts, AIPAC regularly sponsors and organizes political education seminars and workshops to inform its members of the modern lobbying techniques, such as issue development, the legislative process, candidate support practices, voter registration techniques, get-out-the-vote methods and other volunteer political activities such as political action committees, that members may participate in to maximize their impact on the political process. In addition, the seminars and workshops also inform members of their legal requirements in participating in federal elections and sometimes have included information regarding the legal requirements on the formation and operation of political action committees, such as the FEC's own "Campaign Guide on Non-Connected Political Committees." These seminars and workshops are designed exclusively for AIPAC members. Their programs focus on the political involvement of individual members, not PACs. AIPAC does not finance or otherwise pay for a member's attendance at such seminars or workshops.

AIPAC notes that even if the allegations are true, the Act "specifically permits a membership organization to engage in precisely the activities the Complainant's describe."[7]

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[7] AIPAC describes its organizational structure to include an executive committee, officers, a national council, and state chairs. It states that none of these organizational arms of AIPAC has been involved in establishing, maintaining, controlling, or directing any PACs. Furthermore, the Commission has previously determined that there was no reason to believe

In an affidavit, Elizabeth Schrayer states that the "how-to" book referred to in the *Washington Post* article was merely a book entitled, "Guide to Federal Election Law," prepared and utilized by AIPAC for some years before she assumed the leadership of the political department. She states that its use was discontinued in mid-1985 when she became aware of other publicly available material "distributed by the FEC itself containing the same information."

In this matter, the Commission's investigation has not produced credible evidence that appearances at the AIPAC Policy Conferences of incumbent officeholders, who may also have been candidates, involved any express advocacy of their election or the defeat of their opponents or any solicitation on contributions to their campaigns or other activities involving campaign activity. The document presented by the complainants lacks authenticity regarding its author or source or the date of its preparation. Thus, it can be given little weight.

Furthermore, AIPAC has specifically denied that it permits candidates to hold fundraisers alongside its Policy Conferences. No credible evidence has been produced to show that any candidate did hold such a fundraiser. AIPAC has also produced an affidavit from its employee who conducted the more recent political workshops at its Policy Conferences. He avers that he never advised attendees to vote for or contribute to any candidate and denies that Jill

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that AIPAC was affiliated with any of the other pro-Israel PACs originally named in the complaint in this matter. This determination was based on the conclusion that there was no evidence that AIPAC established, maintained, financed, or controlled any of the other PACs as these terms are defined in the Act and Commission regulations.

Buckley ever stated that AIPAC had targeted any candidate or would aid the reelection campaigns of any candidate.

The Commission has long held that incorporated, tax-exempt organizations involved in public policy issues may hold public gatherings related to those issues at which incumbent officeholders, who may also be candidates for reelection, may appear without violating the Act's prohibition on corporate contributions as long as the appearances were held for a major purpose other than the nomination or election of a candidate and did not involve any express advocacy of the election or defeat of any candidate or the solicitation of contributions to any candidate or other factors indicating campaign activity. See, e.g., Advisory Opinion 1980-22.

The General Counsel further concludes that incorporated organizations are not prohibited by the Act from conducting seminars and workshops on how to participate in the political system and comply with federal election laws as long as such seminars and workshops are nonpartisan and are not "designed to urge the public to elect a certain candidate or political party." *See, U.S. v. UAW*, 352 U.S. 580 (1957). For instance, in Advisory Opinion 1986-23, the Commission concluded that a computerized "game" that simulated the term of office and reelection campaign of a freshman Member of Congress could be marketed and sold to congressional offices at a discount because the game's purpose was to educate and inform players and because the content suggested no attempt to influence federal elections.

AIPAC acknowledges that its Policy Conferences have concluded briefings on candidates, their campaigns, and their positions on certain issues, although

it qualifies such admission by contending that it states to participants that AIPAC does not endorse candidates or urge anyone to contribute to a candidate. To the extent that such information is derived, in part, from AIPAC's meetings with candidates, the conveying of such information would be presumed to be done in cooperation, consultation, coordination, or consent with such candidates. If the persons attending this events qualify as "members" of AIPACs under the Act, the obtaining and conveying of such information would be permissible as an internal communication by AIPAC to its restricted class. If, however, the persons attending such events do not qualify as "members" of AIPAC under the Act, then such information is deemed to have been made to the general public and could result in AIPAC's making an in-kind contribution to the respective candidates.

3. Meetings with Candidates

The exhibits to the complaint also contain statements that candidates meet with AIPAC to solicit campaign support from the organization. As previously noted, one exhibit that purports to be a report from the 1983 Policy Conference states that in 1982, 300 candidates solicited campaign support from AIPAC. According to another exhibit—a news article published July 7, 1987, in *The New York Times*, Tom Dine reportedly told the Council of Jewish Federations the previous November that in 1985-86 AIPAC lay leaders and staff met with every Senator up for re-election except one, plus 49 Senate challengers and 205 House challengers, including every new freshman member. He then reportedly named 19 "friends" who would be up for re-election

in 1988. For instance, the November 14, 1988, *Washington Post* article and the June 24, 1987, *Wall Street Journal* article, attached as exhibits to the complaint, state that Governor John Evans[8] of Idaho met with Elizabeth Schrayer and other AIPAC officials early in his campaign for the Senate in his search for large out-of-state contributions. The *Wall Street Journal* article quotes Governor Evans as saying "AIPAC emphasized constantly that they were not a PAC, but they noted that there were Jewish organizations all over the country that had their own PACs and that if we would contact them, they would be able to help us." The article states that AIPAC helped Evans more than a single PAC could in that it "steered" him to a series of "supposedly" independent organizations that gave him $204,950 for his campaign.

More specifically, an exhibit to the complaint contained a page taken from Paul Findley's book, *They Dare to Speak Out*, that included the statement: "AIPAC also helps by providing lists for direct mail fundraising." A third exhibit is a news article that appeared in the November 14, 1988, edition of *The Washington Post* and stated that in 1985 Elizabeth Schrayer, then AIPAC's deputy political director, sent "a sample solicitation letter and list of pro-Israel PACs to a fund-raiser for Evans." The article identifies Morten L. Friedman, a Sacramento attorney, as the Evans fundraiser. It reports that Friedman initially agreed to respond to questions but then declined, saying he was subject to AIPAC's policy. According to the article, Governor Evans said that he

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[8] Governor John Evans was the Democratic candidate for the U.S. Senate in Idaho in 1986.

was not aware AIPAC was trying to raise pro-Israel PAC funds for him through Friedman because he had hired a private fundraiser to do the same thing.

In response, AIPAC acknowledges that "[i]n collecting and analyzing information about federal campaigns, AIPAC routinely meets with candidates for federal office." In a response to supplemental interrogatories, AIPAC more fully described its meetings with candidates:

> AIPAC's political department meets with any individual or his or her representative who is running for election to a federal office and requests a meeting. Typically these meetings last approximately thirty to forty minutes and items of discussion cover four separate areas.
>
> The first topic includes general information about AIPAC. Candidates are informed that AIPAC is a membership organization and not a PAC, that the organization does not rate or endorse candidates and that the organization does not make contributions or expenditures to candidates or solicit contributions on the candidate's behalf. Second, the candidate is informed of AIPAC's primary concerns about the U.S. foreign policy in the Middle East. Candidates are urged to ask questions about substantive policy issues and encouraged to issue a position paper on the Middle East. Third, the candidate is asked to give details of his or her campaign, including the outlook for the candidate's election and the major issues in the campaign. Lastly, candidates are asked whether members of their local community and/or individuals from around the country are providing assistance to the candidate's campaign. Often, the

> candidate or the candidate's representative will discuss with AIPAC whether there are individual AIPAC members in the candidate's community with whom they should speak further about their campaign. At no time during any meeting with a candidate or the candidate's representative is a list of Jewish PACs or list of names distributed.

AIPAC notes that in "addition to helping AIPAC assess a candidate's campaign, meetings between AIPAC and candidates are meant to provide the candidate with information about AIPAC and its positions on foreign policy issues." AIPAC claims that such issue discussions have long been recognized as legitimate activities.

Thomas Dine, executive director of AIPAC, further acknowledges in his affidavit that he and other AIPAC staff members regularly meet with Senators and Congressman regarding issues of concern to AIPAC. He further states:

> . . . Sometimes a Member of Congress' re-election prospects are discussed. At no time have I ever promised or agreed to personally raise money for any Congressman or Senator or his or her campaign, nor to my knowledge did any other member of my staff or representative of AIPAC. When inquiries about financial support for campaigns are made, I routinely inform the individual making the inquiry that AIPAC does not rate or endorse candidates and does not raise any funds for candidates. It is not AIPAC's policy to provide candidates with campaign managers or to provide candidates with lists of AIPAC members for direct mail solicitation purposes unless the lists are purchased for a commercially reasonable price or

exchanged for a list of commercial value equal to the list AIPAC provides.[9]

Morris J. Amitay,[10] who was Dine's predecessor as AIPAC's executive director, states in his affidavit that during his tenure it was "AIPAC's firm policy that AIPAC would not participate in any fundraising for candidates and would not endorse any candidates."

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[9] According to the same *Washington Jewish Week* article, Gary Geller, executive director of Roundtable PAC, is quoted as saying some AIPAC officers "just take it upon themselves to call" and "push contributions for candidates they particularly favor." The complaint describes Thomas Dine, executive director of AIPAC, as "a key contact for candidates seeking donations from Jewish PACs" and refers to an AIPAC newsletter "which regularly reports on how lawmakers and candidates stand on Israel."

AIPAC denies that Tom Dine is or has "ever acknowledged" being a key contact for candidates seeking donations from Jewish PACs. In an affidavit, Dine states that he has never been and is not now a key contact for candidates seeking donations from Jewish PACs. He further stated:

> I have often introduced AIPAC members to elected officials for the purpose of helping to begin friendly relationships, to become involved in political campaigns and to educate officials on issues of concern to AIPAC. At no time, however, have I personally facilitated, or to the best of my knowledge am I aware that any member of my staff facilitated the making of any contribution to a candidate, such as by providing the member with envelopes addressed to a candidate or committee or offering them any other assistance.

He also denied that during his tenure as executive director, AIPAC has ever published a newsletter on how lawmakers and candidates stand on Israel.

[10] Morris Amitay is the treasurer of Washington PAC, a pro-Israel political action committee that he formed after leaving AIPAC.

He adds that when inquiries about financial support for campaigns were made, he would at most suggest that "if the candidate felt comfortable in doing so, he might contact Jewish activists or AIPAC members in their state or District that might be asked to help his campaign." He states that he "made no fundraising calls myself and am not aware of instances where anyone on AIPAC's staff did so."[11]

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[11] The complaint also quotes from another article in the *Washington Jewish Week* that alleged AIPAC officers and staff had aggressively discouraged activists from raising funds on behalf of two pro-Israel challenges. The complaint quotes this material from the article:

> The challengers, Joseph Lieberman of Connecticut, and Hubert H. "Skip" Humphrey III of Minnesota, were running against incumbents widely viewed as friendly to the pro-Israel cause. AIPAC, acting in accordance with its "friendly incumbent" rule, went beyond supporting the incumbents to actively oppose efforts by some Jews to help the pro-Israel challengers, these sources told the *Washington Jewish Week*.

AIPAC claims that even if the allegations in the news article are true, it would have a constitutional right to make such communications to its members. AIPAC then disagrees with the complaint's reference to a statement by Washington attorney Larry Weinberg who offered an opinion to a hypothetical question. AIPAC points out that Weinberg's opinion cannot be viewed as an opinion regarding AIPAC's activities and provides an affidavit from Weinberg to support its position.

AIPAC then refers to another quote from another article in *Washington Jewish Week*:

> [T]he head of another PAC reported that he received a call only recently from an AIPAC officer who, calling explicitly in that capacity, criticized him for contributing to a particular Senate candidate. "We're all

supposed to be with [his opponent]," the officer said, according to this source. "It was an illegal phone call," he said. He declined to speak for the record.

AIPAC notes that the use of an anonymous source in the article makes it impossible for it to investigate the allegation. It claims that the allegation "confuses the alleged actions of an individual who happens to also serve as a volunteer officer of AIPAC with the actions of AIPAC itself." If further asserts that the "anonymous claim that an unidentified AIPAC officer criticized an unidentified PAC official for contributing to an unidentified candidate is hardly proof that AIPAC had a policy to block funds to a candidate for federal office." AIPAC further asserts that the Act and the Constitution do not prohibit AIPAC officials from individually taking it upon themselves to push others to contribute to candidates they favor.

The complaint alleges the AIPAC selects and targets certain candidates for federal elections in order to direct funds to those candidates and elections by AIPAC supporters and the pro-Israel PACs or to block contributions to their opponents. The complaint alleges that this guidance is provided through AIPAC's "black book" and its annual Policy Conferences as well as other contacts with AIPAC. The complaint alleges that AIPAC officials have crossed the line of permissible behavior and contacted the respondent PACs to urge specific contributions to specific candidates. To support its specific contentions, the Complaint draws attention to the similarity in the patterns of contributions by many pro-Israel PACs in races targeted by AIPAC. The complaint states that in 1988 25 pro-Israel PACs contributed to Senator Metzenbaum, Senator Lautenberg, and to challenger Richard Licht while 24 contributed to Senator Durenberger. For 1986, the complaint notes that 25 pro-Israel PACs contributed to challenger Tom Daschle while 21 PACs supported challenger John Evans. For 1984, the complaint points to contributions from 22 pro-Israel PACs for challenger Paul Simon, from 21 PACs for Senator Rudy Boschwitz, and from 20 PACs for Senator Carl Levin.

AIPAC's statement regarding its meetings with candidates demonstrates the depth of its interest in their campaigns and the extent to which AIPAC gathers political intelligence regarding the campaigns of federal candidates and where they stand on issues relevant to AIPAC. AIPAC then uses this information in making a variety of communications to persons it considers its "members."

3. Communications to AIPAC Supporters

(a) The "Black Book"

With regard to the "black book," the complaint states:

> AIPAC's coordination of pro-Israel PACs' donations is greatly facilitated by its distribution of the "black book", a comprehensive, highly confidential guide containing crucial information on every House and Senate race. Exhibit 20. It is

AIPAC asserts through several affidavits of its officers and staff that it does not endorse or support specific federal candidates. In addition, in a supplemental response referring to the *PACs & Lobbies* article, AIPAC takes issue with the article's conclusion that AIPAC must have coordinated certain PAC contributions because of the similar pattern of contributions to candidates, particularly incumbents. AIPAC states: "This conclusion completely ignores the predisposition of all PACs to make contributions to incumbents, and single issue PACs to make contributions to incumbents with committee assignments who most directly effect their single issue concerns." AIPAC further notes "the predisposition of PACs to support challengers who oppose incumbents that are perceived as vulnerable, and for single issue groups to support challengers who oppose incumbents that demonstrate a lack of support for or sensitivity to the single issue group's particular agenda." AIPAC further asserts that the giving pattern of the PACs identified in the article do not support the article's assertion.

sent to only the top 100 or 150 AIPAC members, including many of the leading individuals in the respondent PACs. The "black book" analyzes each political race and rates incumbents on their voting records. "[T]hrough its format, it gives the pro-Israel lobby's biggest givers and most involved activists a clear picture of who is up and who is down in the lobby's view." *Id.* The "black book" also provides details "on how much money each incumbent and challenger has raised and how much he still needs in order to meet his fund-raising goal." Exhibit 21.

Exhibit 20 to the complaint is an article from the *Washington Jewish Week* (the date cannot be determined), which said that AIPAC's "black book" was distributed to only 100 to 150 top members in attendance at the previous month's policy conference. The article states that although the book offers mostly "objective data culled from public sources," it nevertheless provides a good idea of "who is up and who is down" in AIPAC's view. It adds that many who received the book are officers in local and national pro-Israel PACs, who would find the information helpful in deciding who needed financial help in their campaigns. According to the article, the book offers assessments of the incumbents' chances and "gives a thumbnail analysis of the race with frequent tip-offs on the preferred candidate." It includes a voting record checklist on votes considered crucial by AIPAC. It notes that the thumbnail analyses "almost all tilt toward the incumbent if he is viewed as pro-Israel, even if the challenger holds good—perhaps even better—positions on Israel-related issues." The article notes that in Connecticut the pro-Israel

PACs were sticking with incumbent Senator Lowell Weicker, although he was opposed by Joseph Lieberman, a pro-Israel stalwart, who was receiving support from individual Jewish contributors.[12]

AIPAC describes this document, its "Campaign Update," as "no more than the information most membership organizations distribute to members, and often the general public, reflecting the status of the campaigns and the positions of the candidates." AIPAC acknowledges that the document "is distributed to the most politically active AIPAC members" but adds that its distribution "is not based on a member's involvement in a PAC and is not used to direct or control any PAC."

Elizabeth Schrayer, political director for AIPAC,[13] further states in her affidavit that this document is distributed "at two breakfast meetings held once a year, to which approximately 250 of [AIPAC's] most active members are invited." She adds: "The material is entirely an internal communication provided to AIPAC members with information on (1) the electoral prospects of the federal races and; (2) the records of the candidates on U.S. - Israel relations." AIPAC submitted copies of the 1987 and 1988 updates. According to AIPAC, this booklet has been distributed at the Policy Conferences from 1988 to the present.

This update identifies the incumbent and challengers, provides poll results, rates the incumbent's re-election prospects, reviews the candidates' fund-

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[12] This reference to the Connecticut Senate race would appear to place the article in 1988.

[13] Elizabeth Schrayer joined AIPAC in 1983 as an assistant to the political director, became deputy political director in 1985, and political director in 1987.

raising, rates the candidates on their positions on issues of concern to AIPAC, and provides a narrative analysis of the campaign. It is derived in part from the political intelligence AIPAC gathers from its meetings with candidates and makes it clear to AIPAC's most politically active supporters which candidates rate best on the issues relevant to AIPAC and, thus, are deserving of support, financial or otherwise.

(b) Additional Political Department Activities

Moreover, Schrayer states in her affidavit that the central mission of the political department is to educate AIPAC members "about the electoral process and its impact on U.S. - Israel relations." She directs her staff in collecting and making available to members information about current or upcoming campaigns for federal and other public offices. She and other members of her staff meet with candidates to exchange views and "to obtain timely information on the issues and on trends in their campaigns." She acknowledges that she encourages AIPAC members "to build solid relationships with candidates that support strong U.S. - Israel relations." She apprises members "of races in which their involvement would promote a strong understanding by a candidate of the concerns of the American Jewish community."

She has introduced AIPAC members to candidates and provided AIPAC members with the phone numbers and addresses of candidates. Her staff also responds to requests from AIPAC members for candidate position papers.[14] Her job also includes

[14] As noted, AIPAC solicits such position papers from candidates when it meets with them. AIPAC has provided a selection of sample candidate position papers. These sample position papers basically set out the candidate's view with respect to U.S. foreign policy, Israel, and other Middle East issues. AIPAC copies and distributes these candidate position papers to persons it considers it "members" at the request of such persons.

monitoring the extent of Jewish participation in federal campaigns for which she compiled a list of Jewish PACs, a list she describes as similar in character and scope to lists known to be maintained by the four party committees (DSCC, DCCC, NRSC, NRCC). This list has been provided to AIPAC members on "rare occasions".[15] She adds that she has never promised to raise money for any candidate or acted as the agent for any campaign fundraiser and has not personally facilitated the making of any contribution to any candidate. AIPAC maintains that it "has no copies of any sample solicitation letters or lists of pro-Israel PACs in its possession."

Schrayer's affidavit is corroborated by an affidavit by Karen Kaufman, an AIPAC political analyst, who states that her duties included researching

[15] In a sworn response to interrogatories, AIPAC stated that in the early to mid-1980s, various news organizations and political groups began to compile and distribute lists of allegedly pro-Israel PACs. AIPAC acknowledges that in 1986 it did have a list of PACs thought to be pro-Israel that is "informally compiled from these and other sources for its own use in order to monitor one indicator of political activity." AIPAC adds that at first it had no specific policy regarding the distribution of this list "but believes that the list, at most, was distributed to a very limited number of people." AIPAC avers that in 1988 it stopped maintaining such a list to "avoid even the appearance that such a list was indicative of a relationship between AIPAC and pro-Israel PACs." It claims that it no longer maintains such a list.

Senatorial and Congressional campaigns. These duties included meeting with candidates to exchange views and discuss their chances of becoming an elected official. She adds, however, that at no time did she ever promise or agree to raise funds for any campaign or act as the agent of any campaign fundraiser. Her duties also involved her contacting AIPAC members to urge their involvement in federal election campaigns and "to apprise them of certain races in which their involvement, in the campaign, might be useful in encouraging any viable candidates to be supportive of the U.S. - Israel relationship." She adds that it was not her practice "to solicit or suggest that individual AIPAC members make a contribution to any particular candidate." She further states that her duties also included "ascertaining the extent of Jewish participation in federal campaigns," including identifiable Jewish PACs. She notes that she "was given a list of Jewish PACs with names of individuals whom [she] assumed were AIPAC members who were involved in those PACs." She asserts that this list "was not maintained for any purpose other than tracking Jewish support for candidates."

AIPAC's response to more specific allegations notes that the only support the complaint provides for its allegation that AIPAC provides direct mail fundraising lists is the statement in Paul Findley's book. AIPAC states: "The page from Mr. Findley's book offers nothing more. No example. No source. No citation." AIPAC adds that it "does not provide candidates with lists for direct mail fundraising." Instead, it states that mailing "list exchanges are handled through a major commercial list broker located in Wisconsin" and that such exchanges with federal

candidates are arranged by this list broker in a manner consistent with applicable Commission regulations.

With regard to the *Washington Post* article and the Evans campaign, AIPAC states that the article makes no mention of AIPAC offering to provide help for the Evans campaign or a suggestion that the staff person mentioned offered her own services. It asserts that this is an embellishment by the complainants. Instead, AIPAC says that the article simply describes a communication by an AIPAC employee to an AIPAC member. It adds:

> The AIPAC member had met Governor Evans and subsequently volunteered to help his campaign for the Senate. He requested information from a member of AIPAC's staff he believed might help him become a more effective political participant.

AIPAC said it provided him with this information "as part of its ongoing political education program." It acknowledges, as stated in the article, that the communication included "a position paper of a candidate on issues of concern to the member, a sample solicitation letter that the AIPAC member may have found helpful in drafting his own, a list of pro-Israel PACs, and an offer to answer any questions the member may have had about how he could most effectively participate in the political process." AIPAC argues that nothing in the act or regulations prohibits the distribution of such material by an organization to its members.[16]

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[16] AIPAC further states that the conclusions in the article relating to the Evans campaign "is based on nothing more than the author's tendentious belief that overlapping members between AIPAC and certain Jewish PACs and similar patterns

In an affidavit, Morten Friedman (the Evans fundraiser) states that he has been a member of AIPAC since 1977 and an officer since 1986 and has long been active in Jewish affairs and in political affairs, serving as PAC director from 1979 to 1981 for the California Trial Lawyers Association. He states that he met Idaho Governor John Evans at the 1985 AIPAC Policy Conference and talked with him on a number of issues, including the 1986 Senate race and Evans' candidacy. He adds that at that time he "decided to volunteer to assist him in raising funds for his campaign." Shortly after the conference, he informed Elizabeth Schrayer, then AIPAC's deputy political director, that he was assisting Evans and wanted to send some solicitation letters to some Jewish political activists. He said that he asked Schrayer "if she could send [him] a sample solicitation letter that [he] might review." He also requested a list of Jewish PACs to send the letter to and a position paper reflecting Governor Evans' views on Middle East policy. He adds that "[a]s a member of AIPAC, I fully expected that such information could be provided to me." He further states that neither Schrayer nor any other AIPAC official or employee directed or controlled his fundraising efforts or facilitated his solicitation efforts on behalf of Evans. Elizabeth Schrayer states in her affidavit that the providing of Governor Evans' position paper was something routinely done by her or her staff. She also acknowl-

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of contributions are sufficient proof not only are conclusive proof [sic] that the PACs are affiliated, but that 'AIPAC steered' Mr. Evans to them." AIPAC describes this allegation as "untrue." AIPAC also claims this article fails to meet the minimum standards of 11 C.F.R. § 111.4.

edges sending him a list of Jewish PACs that she maintained, but described it as a rare occasion. AIPAC further stated in sworn answers to further interrogatories that the "sample solicitation letter sent to Morton Friedman was the only such letter that Ms. Schrayer or other members of AIPAC's staff specifically recall providing to an AIPAC member."

AIPAC also disputes the allegation that the similarity in the pattern of contributions of selected pro-Israel PACs is evidence of AIPAC's involvement in such activity. AIPAC states:

> Additionally, many candidates also hire fundraisers with special knowledge of the Jewish community. These fundraisers are agents of a candidates' campaign who utilize their numerous contacts and resources to solicit funds from the Jewish community, including Jewish PACs. These individuals and their candidates are tenacious in their efforts to secure contributions for their campaign, often calling Jewish PACs repeatedly until each has given the candidate the maximum amount allowed by law or that they are able. As part of their constant solicitation efforts, a candidate's fundraiser will typically include information about the candidates' campaign, such as the latest polling data, the candidate's position on issues of concern to the Jewish community, the strategies of the campaign and the campaign's financial requirements.
>
> These campaign fundraisers operate independently of AIPAC and AIPAC has no ability to direct or otherwise control their activities. Thus, it should come as no surprise that in certain instances Jewish PACs, all aggressivly [sic]

> solicited by the same candidate and his or her fundraisers, contribute to the same campaign.

AIPAC further contends that compared with other interest groups there is a relatively low level of overlapping contributions from Jewish or pro-Israel PACs to the same candidate.

In this regard, AIPAC submitted affidavits from Barbara Klein, a paid consultant to the 1988 Senate campaign of Pete Wilson, and Kay Weinstock, a paid consultant to the 1988 Senate campaign of Sen. David Durenberger. Both were involved in fundraising for their respective campaigns. In identical language, they state that they made numerous phone calls to Jewish political activists and officials of Jewish PACs to solicit contributions. Where identified Jewish PACs had not contributed to the campaigns and even where they had, they state that they made repeated phone calls to obtain the maximum legal contribution. Both state that they never received directions or requests from AIPAC personnel to solicit specific individuals or PACs on behalf of a federal candidate. They both acknowledge asking AIPAC to provide them with the names of individuals who might be interested in helping their campaigns, either as a volunteer or as a contributor. They add that AIPAC often introduced them to AIPAC members or suggested particular AIPAC members but to their knowledge "never . . . directed any individual to volunteer or contribute to the . . . [c]ampaign or facilitated any such contribution." They denied that AIPAC had ever provided them with a list of Jewish PACs to contribute or a list of AIPAC members to solicit "through a direct-mail campaign." They add that any lists they may have used "that included

AIPAC members were purchased from a direct mail vendor for a commercially reasonable price."[17]

(c) Schrayer memorandum

With regard to specific actions by AIPAC officials and employees to raise funds for candidates, the complaint states:

> For example, a 1986 memorandum from Elizabeth Schrayer, AIPAC's Director of Political Education, was mentioned in a recent CBS *60 Minutes* broadcast and was recently disclosed in the *Washington Post*. In that memorandum, Ms. Schrayer urged a colleague to make certain that several pro-Israel PACs around the country channeled cash contributions to a group of Senatorial candidates. See Exhibit 2. Both Ms. Schrayer and the recipient employee contacted various of the pro-Israel PACs to solicit such contributions. Exhibit 3. The Schrayer memo listed nine pro-Israel PACs and noted that some had not contributed to certain candidates. Records at the Federal Election Commission show that in at least two cases, PACs made additional donations to Schrayer's suggested candidates' after the date of the memorandum. Exhibit 3. This and other internal AIPAC documents show "that the group's top political operative was actively involved with pro-Israel political action committees (PACs) trying to help raise money for several candidates in the 1986 Senate races." *Id.*[18]

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[17] See also the discussion of the Cheryl Kagan affidavit in subsection (d) that follows.

[18] The memorandum was directed to Karen Kaufman.

AIPAC responds that its "policy is to not solicit Jewish PACs for contributions to federal campaigns, or even attempt to exercise any control over their decisions; AIPAC certainly does not have the power or ability to direct the allocation decision of any Jewish PAC." AIPAC further states:

> Ms. Kaufman was a political analyst who was routinely in contact with AIPAC members. Her job was to analyze campaigns, including making rough estimates of the level of Jewish support. The sources for this information included the campaigns themselves, FEC reports (including the FEC reports of Jewish PACs), and conversations with AIPAC's own members. The 1986 memorandum was an unusual instance in which Ms. Kaufman was asked to call a number of AIPAC members to see if they would "try" suggesting to certain Jewish PACs that those PACs make contributions to identified candidates. This was outside the scope of her normal activity. The request to Ms. Kaufman was not made at the suggestion or request of any candidate, but solely as a result of the organization's interest that some candidates supporting strong U.S.-Israel relations merited some support from the Jewish community.
>
> The staff member, in turn, acted under standing instructions to contact only AIPAC members about communications that might be partisan. Her principal source of telephone numbers in making calls was the computerized list of AIPAC members. Her notations on the memorandum refer by name only to AIPAC members.

AIPAC further notes:

> . . . Six of the nine PACs made no contributions to any campaigns despite the calls to AIPAC members about the PACs. Of the three PACs that made any contributions at all after September 30, 1986, not one of them responded in the exact way the memo had hoped. Rather, in the two cases when there was a response in accordance with the memo, the same PAC also responded in direct opposition to the memo.
>
> Another way of stating the same information is that of the 30 suggestions urged in the memo, only three were subsequently made, while in two additional cases contributions were made opposite the memo's preference. Thus, the memo had a positive response rate of 10 percent, a negative response rate of 7 percent and a no response rate of 83 percent.

AIPAC further asserts that this "partisan communication to AIPAC members was clearly permissible." It notes that the "relationship of an AIPAC member to a Jewish PAC does not render it any less so." AIPAC adds that it "was free to urge that its members take any effective action to bring about the recommended contributions, contribute from personal resources, solicit other individuals, or contact PACs with which they were associated." AIPAC further states that the only legal constraint was that it avoid exceeding pure speech, such as by mechanically facilitating the contributions or acting as a conduit for their transmittal. Counsel for AIPAC asserts that these restrictions were observed and that no

communication was made outside the permissible class.

Karen Kaufman acknowledges that she is the "K.K." referred to in the memorandum. Kaufman states that this memorandum "is the only memorandum of its kind [she] recall[s] receiving from Elizabeth Schrayer of any other employee or officer of AIPAC." She adds: "Moreover, it is the only instruction of its kind (i.e., a request oral or written to contact an AIPAC member to suggest a PAC take any specific action) that [she] recall[s] ever receiving from Elizabeth Schrayer . . . ." She adds that she would have understood the memorandum as a request to contact AIPAC members she knew (or through the list she maintained of Jewish PACs and associated AIPAC members) were involved in the nine PACs "to encourage those AIPAC members to encourage the PAC decision makers to consider our suggestion." She states that this instance is the only one she can recall where she made such suggestions "although from time to time members did tell [her] of decisions their PACs had made."

Schrayer, in her affidavit, states that she prepared the memorandum "in response to expressed concern among officers of the organization that some candidates supporting strong U.S.-Israel relations merited some support from the Jewish community, including candidates who had received little or no support from the Jewish community." She adds that it was her intention that "Ms. Kaufman contact AIPAC members associated with or active in certain of the Jewish PACs identified in [her] memorandum." She notes: It was our hope that these individuals would consider proposing to these PACs a contribution for the identified candidates. . . ." She states that all names appearing in the memorandum were names of AIPAC members. She further states that she did not prepare the memorandum with the knowledge or consent of any candidate or at their request or suggestions and did not advise them of this effort. She notes that she did not follow up or take any other action on this memorandum.

Although several candidates were mentioned in the Schrayer memorandum, the two most frequently mentioned were Tom Daschle and Governor John Evans. The pro-Israel PACs were identified in the memorandum as "ICEPAC, CT PAC, YAP, GEORGIA, Congressional Action of Texas, GOLD COAST, Southern Florida Caucus, Five Towns, and Kings PAC."

Commission reports show that after the time of the Schrayer memorandum, the following pro-Israel PACs made contributions to the Daschle campaign:

PAC	Date	Amount
America's Leaders' Fund	10-9-86	$ 4,900.00
Americans for Better Congress	12-06-86	$ 1,000.00
Americans for a Good Government	10-8-86	$ 2,500.00
Badger PAC	10-11-86	$ 2,000.00
BAYPAC	10-6-86	$ 200.00
CAPPAC	10-24-86	$ 1,000.00
Chili PAC	9-30-86	$ 1,000.00
Citizens Concerned	10-6-86	$ 5,000.00
Committee for '18'	10-17-86	$ 1,500.00
Congressional Agenda 80's	10-2-86	$ 150.00
	11-1-86	$ 1,000.00
East Midwood PAC	10-20-86	$ 1,000.00

Five Towns PAC	10-21-86	$ 1,000.00
	10-22-86	$ 1,500.00
Florida Congressional Committee	10-8-86	$ 4,000.00
For Integrity in Government PAC	10-20-86	$ 1,000.00
	12-26-86	$ 250.00
Garden State PAC	10-17-86	$ 2,000.00
Georgia Citizens for Good Gov't	10-8-86	$ 2,000.00
	10-27-86	$ 2,000.00
Heartland PAC	10-30-86	$ 500.00
Kings County PAC	10-26-86	$ 1,500.00
Louisiana for American Security PAC	10-29-86	$ 1,000.00
Massachusetts Congressional Campaign	10-22-86	$ 3,500.00
Multi-Issue PAC	10-15-86	$ 500.00
	10-22-86	$ 500.00
	10-28-86	$ 2,500.00
	12-30-86	$ 500.00
National Action Committee - NACPAC	10-24-86	$ 2,500.00
Pacific PAC	10-21-86	$ 4,000.00
Pennsylvania PAC	10-21-86	$ 250.00
Roundtable PAC	10-22-86	$ 2,000.00
Sacramento Area Good Gov't Assn.	10-17-86	$ 2,000.00
San Diego Community PAC	10-6-86	$ 3,000.00
San Franciscans for Good Government	10-22-86	$ 5,000.00
Seattle PAC	11-1-86	$ 500.00
South Texas Area PAC	10-21-86	$ 1,000.00
Suffolk PAC	10-28-86	$ 50.00
Tennesseans for Better Government	10-29-86	$ 2,400.00

To Protect our Heritage PAC	10-23-86	$ 1,000.00
TX PAC	10-17-86	$ 500.00
Willamette PAC	11-4-86	$ 1,080.00
	Total	**$70,780.00**

After the date of the memorandum, the following pro-Israel PACs made contributions to the South Dakota Democratic Party's federal committee, known as the Democratic Majority Campaign Committee:

PAC	Date	Amount
Desert Caucus	10-17-86	$ 5,000.00
St. Louisians for Better Government	10-30-86	$ 2,500.00
Delaware Valley PAC	10-30-86	$ 2,500.00
Citizens Organized PAC	10-31-86	$ 5,000.00
MOPAC	10-31-86	$ 1,500.00
Mid Manhattan PAC	11-12-86	$ 500.00
	Total	**$17,000.00**

These PACs also gave a total of $48,500 directly to the Daschle campaign with St. Louisians, Citizens Organized, and Mid Manhattan contributing a maximum of $10,000 each.

Commission records indicate that the following pro-Israel PACs made contributions to the Evans campaign after the time of the Schrayer memorandum:

PAC	Date	Amount
American Challenge Today PAC	10-23-86	$ 500.00

Americans for a Better Congress	12-6-86	$ 1,500.00
Americans for Good Government	10-8-86	$ 3,500.00
Badger PAC	10-11-86	$ 2,000.00
Chili PAC	9-30-86	$ 1,000.00
City PAC	10-14-86	$ 500.00
	10-28-86	$ 500.00
Congressional Agenda 80's	10-25-86	$ 1,000.00
	11-1-86	$ 1,000.00
East Midwood PAC	9-30-86	$ 750.00
Five Towns PAC	10-6-86	$ 1,000.00
	10-22-86	$ 500.00
Florida Congressional Committee	10-8-86	$ 4,000.00
For Integrity in Government PAC	10-20-86	$ 1,000.00
Georgia Citizens for Good Gov't	10-8-86	$ 2,000.00
	10-27-86	$ 1,000.00
Heartland PAC	10-30-86	$ 1,000.00
Kings County PAC	10-26-86	$ 1,500.00
Louisiana for American Security PAC	10-29-86	$ 1,000.00
Massachusetts Congressional Campaign	10-22-86	$ 3,500.00
Multi-Issue PAC	10-20-86	$ 500.00
Pacific PAC	10-21-86	$ 5,000.00
Roundtable PAC	10-22-86	$ 1,000.00
Sacramento Area Good Gov't Assn.	10-17-86	$ 3,000.00
San Diego Community PAC	10-6-86	$ 1,000.00
Seattle PAC	11-1-86	$ 500.00
South Texas PAC	10-21-86	$ 1,000.00
St. Louis PAC	10-7-86	$ 500.00

St. Louisians for Better Government	10-9-86	$ 5,000.00
Suffolk PAC	10-28-86	$ 50.00
TX PAC	10-9-86	$ 500.00
	Total	**$46,800.00**

The Young Americans PAC reported making a $4,000.00 contribution to the Evans campaign on September 28, 1986, but it filed an amendment on April 13, 1987, to indicate that the check had been voided.

The following Pro-Israel PACs made contributions to the Idaho Democratic Party:

PAC	Date	Amount
Desert Caucus	10-23-86	$ 5,000.00
National PAC	10-23-86	$ 5,000.00
Citizens Organized PAC	10-27-86	$ 5,000.00
Florida Congressional Committee	10-28-86	$ 4,000.00
National Action Committee PAC	10-31-86	$ 3,000.00
St. Louisians for Better Government	10-31-86	$ 2,500.00
	Total	**$24,500.00**

These contributions help fund coordinated party expenditures on behalf of Governor Evans and a GOTV phone bank. See, MUR 2632. These PACs also gave a total of $54,000.00 directly to the Evans campaign with Desert Caucus and St. Louisians contributing the maximum of $10,000 and Citizens Organized listed as contributing $15,000.

Furthermore, at the time of the memorandum, political committees had not yet filed the October

Quarterly Report covering the period from July 1, 1986, to September 30, 1986. Among the pro-Israel PACs that appear to be mentioned in the memorandum, these contributions were reported as made during this period:

Evans

Georgia Citizens for Good Gov't	8-26-86	$ 1,000.00
Gold Coast PAC	9-29-86	$ 500.00
ICEPAC	7-23-86	$ 500.00
TX PAC	8-14-86	$ 1,000.00
	Total	**$ 3,000.00**

Daschle

Connecticut Good Gov't PAC	7-31-86	$ 1,000.00
Five Towns	9-22-86	$ 400.00
Georgia Citizens for Good Gov't	8-26-86	$ 1,000.00
Gold Coast PAC	9-29-86	$ 1,000.00
ICEPAC	7-23-86	$ 3,000.00
Kings County PAC	7-28-86	$ 2,500.00
TX PAC	8-14-86	$ 1,000.00
Young Americans PAC	9-6-86	$ 4,000.00
	Total	**$13,900.00**

These tables indicate substantial contribution activity by pro-Israel PACs after the time of the memorandum, thus raising the inference that AIPAC's contacts with pro-Israel PACs may have been more extensive than those listed in the Schrayer memorandum. This contribution pattern also tends to corroborate, in part, the memorandum.

(d) Amouyal memorandum

The complaint alleges that on November 3, 1987, an AIPAC employee wrote a memo to her colleagues, Barbara Amouyal (then AIPAC's chief spokeswoman) and Elizabeth Schrayer (AIPAC's chief political operative) urging that AIPAC take explicit action to further the campaigns of candidates supported by AIPAC. The suggested activities included contacting the press and other grass roots activities. The complaint then quotes this portion of the memorandum as it relates to the 1988 Rhode Island Senate race:

> Lt. Governor Richard Licht (D) of Rhode Island is running against incumbent Senator John Chafee (R). Licht, who is Jewish, has a very good chance. Our problem is that the pro-Israel community is not excited and is not forthcoming as they should be. We need to put the word out on this race, emphasizing Chafee's poor record. The focus should be to generate interest for a terrific candidate to replace a poor supporter of our issue
> . . .

The complaint then quotes from an article in the *Washington Jewish Week*, where Amouyal reportedly said that the memo "obviously reflected the view of some high level staffers at AIPAC."

AIPAC describes this document as merely a "memorandum written by a low-level staffer to a junior employee (whom AIPAC eventually dismissed) in preparation for her participation in a Jewish press meeting." AIPAC denies that it was written to further the campaigns of candidates supported by AIPAC. It adds that the "memorandum does nothing more than sequentially mention every 1988 presiden-

tial primary campaign with suggestions on efforts that might be made through press stories to elucidate the foreign policy views of each candidate." It acknowledges that there is a reference to the Senate contest between Richard Licht and John Chafee at the end of the memorandum but refers to this reference as "nothing more than an internal office memo between staff regarding thoughts on the race."

AIPAC submitted an affidavit from Cheryl Kagan, who in the 1987-88 election cycle was a paid staff person in the Licht campaign with responsibility for raising funds, including from the Jewish community and Jewish PACs.[19] She states that in her fundraising capacity she made "numerous phone calls" as well as repeat calls to Jewish activists and officials of Jewish PACs to solicit the legal maximum contribution. She adds that she "never received . . . directions or requests from AIPAC personnel to make solicitations of individuals or Jewish PACs on behalf of a candidate for federal office." She acknowledges, however, that she "often asked AIPAC to provide me with names of individuals who might be interested in helping the Licht campaign, either as a volunteer, or as a contributor." She states that "AIPAC often introduced me to or suggested particular AIPAC members, but never to my knowledge directed any individual to volunteer or contribute to the Licht campaign or facilitated any such contribution." She notes that she often contacted individuals from her own solicitation lists compiled through her own research and "contacts developed through years of involvement and work with Jewish political activists and the Jewish

[19] Her affidavit contains language identical to that in the affidavits of Klein and Weinstock, reviewed earlier.

community in general." She concludes that "AIPAC has never provided me with a list of Jewish PACs to solicit contributions for any candidate for federal office, nor has AIPAC ever provided me with a list of AIPAC members from whom I sought to solicit contributions for a candidate for federal office through a direct-mail campaign."

According to the March 1, 1989, issue of *PACs & Lobbies*, the Licht campaign received $229,802 from Pro-Israel PACs.[20] With regard to the pro-Israel PACs that were originally respondents in this matter, the Licht campaign received a total of $178,500. The following contributions were made to the Licht campaign after the memorandum to Barbara Amouyal was written on November 3, 1987, through the end of 1987:

PAC	Date	Amount
Americans for Good Government	11-10-87	$ 3,000.00
Hudson Valley PAC	11-12-87	$ 5,000.00
BAYPAC	11-14-87	$ 500.00
Chicagoans for a Better Congress	11-16-87	$ 500.00
Northern New Jersey PAC	11-19-87	$ 1,000.00
Citizens Organized PAC	11-19-87	$10,000.00
Desert Caucus	11-22-87	$10,000.00
Garden State PAC	11-30-87	$ 2,000.00
Roundtable PAC	12-1-87	$ 1,000.00
East Midwood PAC	12-2-87	$ 1,000.00
National PAC	12-2-87	$10,000.00

[20] The General Counsel's review of the FEC database indicates that pro-Israel PACs contributed a total of $228,402 to Licht in the 1988 electoral cycle.

Chicagoans for a Better Congress	12-4-87	$ 3,000.00
Citizens Concerned	12-4-87	$ 3,000.00
Joint Action Committee	12-10-87	$ 2,500.00
Multi-Issue PAC	12-15-87	$ 1,000.00
Florida Congressional Committee	12-16-87	$ 5,000.00
St. Louis PAC	12-20-87	$ 5,000.00
Five Towns PAC	12-21-87	$ 1,000.00
San Franciscans for Good Government	12-21-87	$ 5,000.00
Delaware Valley PAC	12-22-87	$ 2,500.00
Mid Manhattan PAC	12-22-87	$ 2,500.00
St. Louisians for Better Government	12-22-87	$ 5,000.00
Texas PAC	12-28-87	$ 1,000.00
Americans for Good Government	12-29-87	$ 2,000.00
National Action Committee	12-29-87	$10,000.00
Hudson Valley PAC	12-31-87	$ 5,000.00
	Total	**$97,500.00**

Thus, in the two months after the memorandum was written, the Licht campaign received at least $97,500.00 from pro-Israel PACs. Some PACs made more than one contribution during this period, indicating repeated solicitations. Although this pattern is consistent with the statements of Cheryl Kagan in her affidavit, it also raises the inference that AIPAC employees may have also contacted persons associated with some or all of these PACs to suggest support for the Licht campaign, as suggested in the Amouyal memorandum.

(e) 1990 Louisville House Democratic Primary Election

In May 1990, a news article appeared in the *Louisville Courier-Journal* stating that Jeff Hutter's Democratic primary campaign against incumbent Rep. Romano Mazzoli was being aided by contributions from pro-Israel groups and others outside of Kentucky. The article quotes campaign manager Thor Hesla as saying the campaign got "tremendous support" from AIPAC, particularly in putting a candidate in contact with a "network" of donors. The article adds that according to Hesla AIPAC political liaison Mark Moskowitz helped make follow-up phone calls to pro-Israel groups after they were sent information about Hutter. The article also quotes two Hutter operatives, Robert Bassin (who was his Washington fundraiser) and Louisville attorney Jonathan Goldberg, as denying AIPAC had any significant involvement in the fundraising. They said AIPAC merely provided information on Rep. Mazzoli's record and suggested to potential donors that they contact Moskowitz to confirm Rep. Mazzoli's record. The article quotes AIPAC spokeswoman Toby Derushowitz as saying that some AIPAC members may be helping Hutter, but that the organization itself is not.

According to the FEC database, Jeffrey Hutter raised and spent approximately $287,163 in his primary election campaign challenge to Rep. Romano Mazzoli, ending the campaign with no cash on hand and no debts owed by his principal campaign committee. Hutter raised $112,700 from political action committees, of which $13,500 came from the following pro-Israel PACs:

PAC	Date	Amount
Washington Political Action Committee	4-4-90	$ 500.00
Florida Congressional Committee	4-21-90	$ 2,000.00
Maryland Association for Concerned Citizens	4-26-90	$ 1,000.00
Citizens Organized Political Action Committee	5-7-90	$ 2,000.00
Desert Caucus	5-10-90	$ 1,500.00
Americans for Good Government, Inc.	5-11-90	$ 1,000.00
Garden State Political Action Committee	5-14-90	$ 1,000.00
Joint Action Committee for Political Affairs	5-16-90	$ 1,000.00
Roundtable Political Action Committee	5-18-90	$ 500.00
Hudson Valley Political Action Committee	5-23-90	$ 2,000.00
National Action Committee	5-23-90	$ 1,000.00
	Total	**$13,500.00**

Both Thor Hesla and the candidate Jeffrey Hutter provided statements relating to the news articles and their contacts with AIPAC. Both point out that Thor Hesla was the campaign manager but was not directly involved in fundraising. Hutter states that there was a separate structure for fundraising that was well in place before Hesla joined the campaign. Hesla notes that fundraising at the local level was through a finance committee and that a professional fundraising firm in Washington, D.C., Robert H. Bassin and Associates, was retained for raising contributions at the national level. He adds that the only material the campaign received from AIPAC was limited to issues relating to Middle East affairs such as AIPAC's briefing book.

Hesla recalls that Mark Moskowitz of AIPAC called him and Hutter on at least one occasion each to ask about the campaign generally. He notes that because Hutter often discussed Middle East affairs at campaign appearances, Hutter may have called AIPAC on occasion for clarification of specific issues. Hesla said that he was not aware of any list of names given to the Hutter campaign by AIPAC and that anyone who made a contribution from outside the Louisville area "did so at the request of Mr. Bassin, or a representative of the Hutter campaign in Louisville." He added that he is not aware of any calls made by AIPAC on Hutter's behalf or any follow up calls by AIPAC to pro-Israel groups after they were sent campaign materials about Hutter.

Hutter acknowledges that he met on two occasions with Mark Moskowitz at AIPAC's offices in Washington, D.C., through arrangement of Robert H. Bassin. He notes that he was encouraged to contact AIPAC to become better informed on issues relating to Israel by people in the Louisville Jewish community. He recalls that the first meeting occurred on April 5 or 6, 1990, and the second one on April 30 or May 1, 1990. Hutter adds that the topics discussed at these meetings related to Israel and the United States support for Israel, with particular concern by AIPAC on the need for loan guarantees for housing for Soviet Jews.

Hutter states that "AIPAC did not provide me with information about my opponent, and I did not ask for any such information." He does acknowledge that

Moskowitz "asked how my campaign was going, but did not ask for specific detail, and did not offer any advice." He states that the two meetings with AIPAC "did not generate sources of contributions." Hutter said the only material he received from AIPAC was its briefing book "about Middle East issues."[21] He said he called Moskowitz a couple of times about questions that had arisen "from campaign appearances before jewish groups."

AIPAC states that neither Moskowitz nor AIPAC provided any financial support to the Hutter campaign, made any contributions to or expenditures for the Hutter campaign, or made any solicitations of AIPAC members of others on behalf of the Hutter campaign. It places the dates of the two meetings between AIPAC and Hutter as March 8, 1990, and May 1, 1990. It states that Hutter, Moskowitz, and Laurie Westley attended the March 8 meeting, while Hutter, Moskowitz, Elizabeth Schrayer, Brian Lunde, George Burger, and Robert Bassin attended the May 1 meeting. AIPAC also acknowledges that Moskowitz spoke with Thor Hesla on May 24 and May 25, 1990.

In an affidavit, Mark Moskowitz states that the March 8 meeting "was typical of the meeting I and other members of the political department have with candidates for federal office" and lasted approximately 40 minutes. Moskowitz adds:

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[21] AIPAC provided the General Counsel with a copy of its candidate's briefing book, a loose-leaf binder. Its contents relate solely to issues relating to the Middle East and Israel. No campaign related material was contained in the copy of the book received by the General Counsel.

> We first discussed general information about AIPAC, including that AIPAC is a membership organization but does not rate or endorse candidates; that AIPAC does not make contributions or expenditures to the candidate or solicit contributions on the candidate's behalf; and that AIPAC is not a PAC. We then discussed AIPAC's primary concerns about U.S. foreign policy in the Middle East, such as foreign aid, arms sales and international terrorism and asked Mr. Hutter for his views of these issues. Thereafter, we asked Mr. Hutter to explain his strategy for election to the House of Representatives as well as his view on his chances for success. In the course of this discussion, Mr. Hutter informed us of certain members of the pro-Israel community he had recruited to his campaign.

With regard to the May 1 meeting, Moskowitz states:

> The purpose of this second meeting was to bring AIPAC's political department up to date on the status of Mr. Hutter's campaign. Mr. Hutter updated us on the progress of his race and explained his financial requirements for the remaining weeks of the campaign. Mr. Hutter asked if there were any AIPAC members or other people his campaign staff could contact. Mr. Hutter was reminded that AIPAC does not rate or endorse candidates or raise or solicit funds on a candidate's behalf. Since Mr. Hutter had already identified several AIPAC members who were committed to his campaign, it was suggested that he continue to urge those persons to further assist him in his efforts.

He further avers that he has reviewed the article that appeared in the *Louisville Courier-Journal* and adds that "[a]t no time did I make follow-up calls to pro-Israel groups after they were sent information about Hutter or any other candidate." He adds that he spoke with Thor Hesla on the telephone on May 24 to seek "updated information about the status of the Hutter campaign" and again on May 25 when Hesla called to inform Moskowitz that Hesla had talked to a reporter for the *Courier-Journal* and had given the reporter Moskowitz's name.

AIPAC also submitted an affidavit from Robert Bassin, president of Robert H. Bassin and Associates, Inc., an independent fundraising and political consulting firm. Bassin states that he was a paid fundraising consultant to the Hutter campaign in 1990 with responsibilities for raising funds from individuals and PACs including those "for whom the interests of the American Jewish community were of particular importance." In that capacity, Bassin adds that he "made numerous and repeated phone calls to the president, treasurer and other members of numerous Jewish PACs to solicit contributions on behalf of Mr. Hutter." He states:

> When I solicited contributions on behalf of Mr. Hutter either from individuals or Jewish PACs, I made a concerted effort to explain the reasons why Mr. Hutter was deserving of Jewish support. I explained the latest polling data on the race, the vulnerabilities of Mr. Mazzoli, the candidate's and Mr. Mazzoli's position on issues of concern to the Jewish community, the strategies of the campaign and the campaign's monetary requirements. I often mailed information packets along with any

> requests for contributions to the Hutter campaign. I also asked, on occasion, that Mr. Hutter call key individuals or PAC personnel for support.
>
> I never received, nor have I ever received instructions, directions, assistance or requests from AIPAC personnel to make solicitations of individuals or Jewish PACs on behalf of a candidate for federal office.

Bassin adds that he worked from his own solicitation lists complied through his firm's own research and contacts developed over the years in working with Jewish political activists and the Jewish community in general. He states that "AIPAC has never provided me with a list of Jewish PACs to solicit contributions for any candidate for federal office, nor has AIPAC ever provided me with a list of AIPAC members." He further notes with regard to the May 1 meeting, which he says he arranged:

> Mr. Hutter and I explained the general progress of the Hutter campaign, including Mr. Hutter's projected financial requirements for the remaining weeks of the campaign. Mr. Hutter inquired as to whether there were additional AIPAC members or other people his campaign staff could call to raise additional campaign funds. Mr. Moskowitz and Ms. Schrayer informed Mr. Hutter that neither they, nor other employees of AIPAC could raise or solicit funds on Mr. Hutter's behalf. Both explained that generally House candidates have a tougher job in raising money from the Jewish community and suggested that Mr. Hutter remotivate those already enthusiastic about and committed to his campaign. At no time

> did Mr. Moskowitz, Ms. Schrayer or other AIPAC employees offer to make phone calls on Mr. Hutter's behalf or to make follow up calls to Jewish groups after they were sent information about Hutter. I am also not aware that any such calls were made by employees of AIPAC.

AIPAC adds that the only documents given to the Hutter campaign were the Candidate Briefing Book, the most recent issue of *Near East Report*, and the most recent issue memorandum or action alert.

Bassin's statement regarding his efforts to solicit contributions to Hutter from Jewish PACs is consistent with the affidavits submitted by AIPAC from three campaign fundraisers regarding the extent, or lack thereof, of AIPAC's participation in such efforts. The statements from Hutter, Hesla, Bassin, and Moskowitz do illustrate the degree of interest AIPAC's Political Department has taken in federal elections involving incumbents AIPAC perceives as unsupportive of its positions and the campaign or election strategy of challengers to such incumbents. These statements also illustrate the extent to which AIPAC undertakes efforts to obtain such information and keep updated on it. This depth of involvement would necessarily mean that any communications by AIPAC derived, in part, from such political intelligence obtained from candidates and their campaigns would be deemed to be taken in cooperation, consultation, coordination, or consent of such federal candidates.

(f) 1986 California Senate Election

The complaint alleges:

> In 1986, AIPAC staff members traveled to California and met with Breck McKinley, a Libertarian Party candidate for the Senate in California. Exhibit 5 at 1. These AIPAC staffers offered to get him a campaign manager and to finance a direct-mail campaign for him. *Id.* According to Mr. McKinley, the stated purpose of the AIPAC employees was to siphon votes away from Republican Senate candidate Ed Zschau. *Id.*

The referenced exhibit to the complaint is a June 24, 1987, *Wall Street Journal* news article. This article states that in September 1986, three AIPAC staff members, identified as regional directly Murray Wood, lobbyist Dan Cohen and intern Michael Tuchin, met at AIPAC's Los Angeles office with Breck McKinley, the Libertarian Party candidate for the U.S. Senate in the 1986 general election.

The article further states that according to McKinley, Cohen offered to get him a campaign manager and to finance a direct mail campaign for him in heavily Republican Orange County. It adds that according to McKinley, Cohen said his purpose was to "get" Zschau by siphoning votes away from him. McKinley apparently considered but rejected the offer. The article states that an AIPAC spokeswoman confirmed that a meeting took place but described it as a routine meeting that AIPAC staff members have with many candidates and asserted that no offer of campaign aid was ever made. The November 14, 1988, *Washington Post* article reported a denial from Murray Wood, AIPAC's regional direc-

tor, that any assistance was ever offered. According to the article, Wood stated in a letter to the *Los Angeles Times* that "[w]e clearly did not offer, do not offer, and cannot offer financial or other assistance . . . not directly, not indirectly, not formal, not implied."[22]

AIPAC acknowledges that "[t]wo AIPAC staff members did meet with Breck McKinley in 1986."[23] It adds that when McKinley later claimed AIPAC staff members had offered to provide him assistance with a direct mail campaign or to find him a campaign manager, both staff members "promptly and publicly" denied it in letters to the news media reporting McKinley's statement. AIPAC further claims that "even if the allegations were true, it constitutes no violation." AIPAC asserts that the "Act does not prohibit such an offer of aid and since AIPAC's policy and practice would have precluded its implementation, it could not have led to a violation."

AIPAC submitted affidavits from Murray Wood and Dan Cohen regarding the meeting with Breck McKinley. Wood, regional director for AIPAC in Los Angeles, states that he "sometimes" meets with candidates to exchange views on issues of concern to AIPAC and "to discuss their own assessment of their chances of becoming an elected official." He acknowledges that he met with McKinley "to discuss his views on a number of foreign and national security policy issues, as well as his impressions of the race and his own campaign strategy." He denies, however, that either he or Cohen offered "McKinley assistance of any kind." He states that they "did not offer to get him or provide him with a campaign manger and . . . did not offer to finance a direct mail campaign for him." Cohen, an AIPAC lobbyist in the Washington office, executed an affidavit that contains language identical to Wood's.

Breck McKinley, however, continues to dispute these claims by Wood and Cohen. He states that he did meet with AIPAC representatives Wood, Cohen, an Tuchin in the summer of 1986 at AIPAC's offices on La Cienega Boulevard in Beverly Hills. He adds that he had not met these persons before and has not met with them since that meeting in 1986. McKinley states that he was called by some unidentified person who said they were calling on behalf of Dan Cohen and that he had come to town from Washington, D.C. to interview various candidates and would like to meet with McKinley. He said that the meeting included some brief small talk and a brief statement by him about the Libertarian position in general and his own position of not favoring aid to Israel or any other foreign nation. McKinley states that "AIPAC did offer me assistance in my 1986 Senatorial campaign." He adds:

> The proposed plan was to support me as part of a "spoiler" campaign to draw enough votes from Tschau [sic] to get Cranston elected. "Better Cranston for six more years than Tschau for twenty", was the point of view presented. I was

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[22] This article, however, does not identify the third-party candidate who allegedly was offered such assistance.

[23] AIPAC has also stated in sworn answers to supplemental interrogatories that its employees did not meet with Senator Alan Cranston, Edward Vallen, or Paul Kangas in connection with the 1986 California Senate election. It also stated that its employees did not meet with Michael Goland or persons associated with the National Pro-Life PAC in connection with this Senate election.

> told that, since I did not have one, they would provide me with a campaign manager. I was told that they would pay for a mail campaign into Orange County on my behalf just before the election. Since the meeting was in AIPAC's offices and Murray Wood had been introduced as the Regional Director of that organization, I assumed that when I was told that "we" will do this it meant AIPAC. The meeting was conducted by Dan Cohen.

McKinley further states that to the best of his knowledge "no money was raised or spent by AIPAC on behalf of my 1986 Senatorial campaign."

The General Counsel disagrees with AIPAC's position that even if it had made such an offer, no violation occurred because no such assistance was in fact provided to McKinley. In the General Counsel's view, when an incorporated entity dispatches its personnel to meet with a candidate for federal office, discusses the campaign, and offers such candidate campaign assistance, such as providing the candidate with a campaign manager, a violation of the prohibition on corporate contributions occurs, even if the candidate should refuse the offer. The General Counsel concludes that Congress intended 2 U.S.C. § 441b to prohibit such activity. The General Counsel recognizes, however, that in this particular matter the evidence regarding whether AIPAC offered campaign assistance to McKinley is inconclusive. These circumstances nevertheless illustrate AIPAC's efforts to collect political intelligence regarding federal candidates.

(g) Campaign Workers

The Complaint alleges that in 1982 AIPAC "provided funds and campaign workers" to help defeat Rep. Paul Findley of Illinois, a Congressman widely perceived to be friendly to the Arab cause.[24] Among the exhibits to the complaint is a document that purports to be a report of the June 12-14, 1983, AIPAC Policy Conference at the Washington Hilton. This document contains the statement that "AIPAC officials took at least partial credit for the record high aid amounts to Israel and the electoral defeats of Adlai Stevenson and Paul Findley." It later states:

> Staffers were bellicose about Percy's fate, promising the same treatment against him as Findley received. In addition to funds and campaign workers, AIPAC provided Durbin with 200 student volunteers bussed into Findley's district 2 weeks before the election. Durbin's winning margin was only 1400 votes; if each of the students had swayed 7 voters that action alone defeated Findley.

Another exhibit to the complaint is an article in the November 17, 1998, *Washington Jewish Week*, that states:

> One Republican Jewish activist took note of the 1982 campaign against pro-PLO Rep. Paul Findley (R-Ill.), a contest in which pro-Israel PACs massively backed Findley's challenger, Richard Durbin, who beat him. Even AIPAC officials have privately acknowledged the lobby's heavy active involvement in that race.

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[24] Paul Findley is one of the complainants in this matter.

A third exhibit is a document that purports to be a report of the 1984 AIPAC Policy Conference. It notes that Steven J. Rosen, then AIPAC's director of research and development, hosted a political action panel where he praised AIPAC's political leadership development program of workshops across the country to instruct more than 5,000 student "members" in techniques for political action and PAC fundraising.

AIPAC claims that the anonymous memorandum attached to the complaint "does not depict any violation of the Act." It asserts that even if it had encouraged its "members to volunteer or contribute" to Durbin, "it would clearly be a protected activity of a membership organization." AIPAC cites to exemptions in the Act for communications by a membership organization to its restricted class. AIPAC also cites to Advisory Opinion 1987-29, which the Commission further addressed the right of a membership organization to communicate with its restricted class and urge that it make contributions to recommended candidates.

The campaign committee for Rep. Richard Durbin states that students and volunteers did perform campaign tasks prior to the 1982 election. It specifically states that on election day students from the campus of the University of Illinois in Urbana traveled to Decatur and Springfield to perform campaign tasks. It estimated there were 30 students in Decatur and 50 in Springfield. The committee also provided copies of 18 checks it issued to drivers of cars who brought several other students. The check reimbursements were for mileage and meals. It states that to the best of its knowledge all expenses incurred by the students were reimbursed by the committee. It states

that it has no knowledge of any role played by AIPAC in relation to the volunteer effort.[25]

As noted, the complainants have presented only a bare allegation contained in a document that lacks authenticity regarding its author, its source, or the data of its preparation. AIPAC has denied providing any such assistance. The Durbin campaign has also denied knowledge of any AIPAC involvement. The evidence shows that the Durbin campaign made the payments for out-of-pocket expenses. The events themselves occurred in 1982. Thus, there is a lack of credible evidence regarding AIPAC's alleged involvement in providing campaign workers to the Durbin campaign with respect to the 1982 general election.

(h) Asher solicitations

The complaint also alleges that in "1985, the then-Chairman of AIPAC's Board, Robert Asher, sent letters to major Jewish political donors urging them to send $1,000 to the reelection campaign of Senator Mark Andrews (R-N.D.)." It further alleges that "[f]our years before that, Mr. Asher 'steered some money to the opponent of North Dakota Democratic

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[25] The Commission's database indicates that up to 30 pro-Israel PACs may have contributed approximately $100,000 to Rep. Durbin's 1982 campaign. Because of the general and generic names of many pro-Israel PACs as well as other PACs, a precise number of pro-Israel PACs that contributed to the 1982 Durbin campaign could not be ascertained. Nevertheless, the database shows at least 30 unconnected PACs with general names, similar to those used by pro-Israel PACs, as well as several identifiable pro-Israel PACs, contributed $105,325 to Rep. Durbin's 1982 campaign.

Congressman Byron Dorgan.'" These statements came from an article in *The New Republic*, which stated:

> For example, Robert Asher, the chair of AIPAC's board, leans Republican. He is particularly close to Republican senator Mark Andrews of North Dakota, who faces a tightening reelection race this year. Andrew's Democratic opponent, Kent Conrad, also pro-Israel, is unlikely to get much Israel-PAC money. In a 1986 letter to major Jewish donors, Asher urged Jews to send $1,000 to Andrews-for-Senate. He added, "I look forward to greeting you personally at the AIPAC Policy Conference." Four years ago, as a favor to Andrews, Asher steered some money to the opponent of North Dakota Democratic congressman Byron Dorgan, whose record on Israel is excellent.

AIPAC states that the article makes no claim that the letters were sent by Mr. Asher in his capacity as an officer of AIPAC or offer any proof that they involved any expenditure by AIPAC. AIPAC notes that Asher's affidavit states the letter was sent entirely as a volunteer to the Andrews campaign. AIPAC further notes that Asher is a volunteer to AIPAC and has received no compensation from and maintains no office at AIPAC and that he resides in Chicago, where there is no AIPAC office. AIPAC adds that Asher "commonly adds handwritten notes to his letters referring to some mutual interest or mentioning some forthcoming event." AIPAC claims the text of the solicitation letter made no reference to AIPAC and was made entirely on behalf of Senator Andrews. AIPAC also states that the allegation

Asher steered money to the opponent of Rep. Dorgan is "simply false." AIPAC notes that Asher himself made a contribution to the Republican nominee in that race but neither solicited nor received a single contribution for Rep. Dorgan's opponent and did not "steer" any money to him.

AIPAC also submitted an affidavit from Robert Asher in which he states:

> . . . I have sent letters to major Jewish political donors to urge them to support certain candidates for federal office. I did send solicitation letters on behalf of Senator Mark Andrews. Such letters were sent on my own stationery, mailed at my own expense and done only in my individual capacity as a supporter of the candidate. . . . The solicitation letter itself made no reference to AIPAC and was made entirely on behalf of the Andrews campaign. AIPAC had absolutely no involvement in the funding of this solicitation effort, or any other solicitation efforts I may have made, nor did AIPAC, or any officer of AIPAC direct, order or otherwise control my solicitation efforts, in these, or any other instances.

Asher further avers that while he gave a donation to the opponent of Representative Dorgan, he "never solicited any other individual for funds to his opponent, nor did I ever steer any contribution to his opponent."

The General Counsel concludes that the evidence indicates that Asher's solicitations were made by him personally and are not attributable to AIPAC.

5. Conclusion

As noted in the above discussion, the General Counsel concludes that several specific allegations lack sufficient credible evidence or have been rebutted. What remains, however, is evidence—chiefly from affidavits and statements submitted by AIPAC itself—that AIPAC has coordinated and consulted with candidates in undertaking efforts on behalf of the campaigns of these candidates. In some cases, such efforts have involved the express advocacy of the election or defeat of candidates.

AIPAC readily admits that it meets frequently with candidates for federal office and as part of such meetings it asks the candidates about the details of their campaigns including the outlook for their election and the major issues in the campaign, and how much assistance the campaign is receiving locally and nationally. AIPAC also acknowledges that it discusses with such candidates whether there are individuals that AIPAC considers its members in the candidate's community with whom they should speak. Once AIPAC holds such a meeting with a candidate and discusses the candidate's campaign in this fashion, any action AIPAC later undertakes on behalf of that candidate's campaign could not be considered independent but would instead be viewed as activity undertaken in cooperation, coordination, or consultation with the candidate or the campaign.

AIPAC Political Director has acknowledged in an affidavit that she has introduced AIPAC "members" to candidates and provided AIPAC "members" with candidate phone numbers and addresses. Fundraisers for federal candidates state that they have asked AIPAC to give them the names of persons who might

be interested in helping their campaigns and that AIPAC has introduced them to AIPAC "members" or suggested particular "members" to contact who might be interested in aiding the campaign. In an affidavit, one AIPAC employee admits that she does contact AIPAC "members" to urge their involvement in federal election campaigns and "to apprise them of certain races in which their involvement, in the campaign, might be useful in encouraging any viable candidates to be supportive of the U.S. Israel relationship," although she claims it was not her practice to solicit or suggest a contribution to a particular candidate.

AIPAC also solicits and collects candidate position papers on Middle East issues and copies and distributes them to its "members." AIPAC further acknowledges providing a "member," who represented himself to AIPAC as also a candidate fundraiser, with a sample solicitation letter, a candidate's position papers, and a list of Jewish PACs. Although AIPAC claims this was the only such letter its staff specifically recalls, it did describe the sending of the letter as part of its on-going political education program. AIPAC also notes that it permits candidates to rent its mailing list from a commercial list broker at the usual commercial rate. AIPAC also prepares and distributes to its most politically active "members" a "campaign update" that discusses the voting record and positions of incumbent members of Congress and rates their reelection prospects in a manner that makes it clear who should be supported and who should be opposed.

AIPAC has in the past maintained a list of Jewish PACs and tracked their support for federal candidates. AIPAC acknowledges that an employee, Karen

Kaufman, contacted AIPAC "members" associated with several Jewish PACs to solicit financial support for certain candidates' campaigns. It seeks to minimize this activity by calling it an "unusual instance" and "outside the scope of her normal activity" as well as claiming the effort was relatively unsuccessful. Elizabeth Schrayer acknowledges, however, in her affidavit that the memorandum was sent in response to the concerns of the officers of AIPAC that certain candidates were not receiving sufficient financial support. The pattern of contributions to the Evans and Daschle campaigns and their respective state parties, however, suggests that calls to "members" associated with other Jewish PACs may have also been made. The pattern of contributions to the Licht campaign following the comments in another internal memorandum further suggests that such solicitations by AIPAC may not have been as unusual as AIPAC claims. Such communications urging persons to contribute to a particular candidate or to seek to have a particular political action committee contribute to a particular candidate are themselves a form of expressly advocating the election or those candidates.

The General Counsel concludes that the above activities that expressly advocate the election or defeat of particular candidates or that are undertaken after meetings with candidates to discuss "the details" of their campaigns and thus are done in consultation, coordination, consent, or cooperation with such candidates are activities prohibited by 2 U.S.C. § 441b unless they fit within one of the recognized exemptions to this prohibition. All of these activities consists solely of communications to persons AIPAC considers its "members." Thus, whether or not these activities violate Section 441b depends on whether or

not the persons AIPAC considers its "members" qualify as members under the Act. This brief now turns to that issue.

C. "Membership" Status of Individuals Who Belong to AIPAC

In addition to its regulation defining "members," the Commission has through previous MURs and the advisory opinion process, elaborated on factors that will support an organization's claim to the membership exception. In determining if a class of membership has the requisite "enduring and independently significant financial or organizational attachment," the Commission has considered, in light of *NRWC*, whether such persons maintain some right to participate in the governance of the organization and some obligation to help sustain the organization through regular financial contributions of a predetermined amount. *See* Advisory Opinions 1988-38, 1987-5, and 1984-22.

In addition, in Advisory Opinion 1977-67, the Commission determined that "a person can only be considered a member of an organization if he or she knowingly has taken some affirmative steps to become a member of the organization."[35] The Commission went on to indicate that "the solicitation of political contributions from members of an organization derive from the special relationship that the organization has with its members (*see* 117 Cong. Rec. 43380 (remarks of Rep. Hansen)) and that, accordingly, the

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[35] In Advisory Opinion 1977-67, the Commission noted that certain of the requester's solicitation materials asked for a financial contribution and the solicitees' support on specific issues, but did not mention the procedures whereby an individual would become a member in the organization.

membership relationship must be evidenced by the existence of rights and obligations vis-a-vis the corporation." The Commission also premised its opinion on the existence of a predetermined minimum amount for dues or contributions as a prerequisite to claiming the membership exception.

In Advisory Opinion 1982-2, the Commission considered whether it was permissible for the National Radio Broadcasters Association ("NRBA") to send letters to its members recommending that they contribute to and vote for certain candidates for Federal office. The NRBA was a trade association, incorporated in the District of Columbia as a non-profit, nonstock corporation with members. The NRBA bylaws provided for two classes of members, active and associate members. Both classes paid dues, assessments and other fees as set by the Board of Directors.

In order to be eligible for active membership in NRBA, the individual, partnership, firm, or corporation, had to be licensed by the Federal Communications Commission to operate, or to hold the permit for the construction of, a commercial AM and/or FM radio broadcast station. Active members, who were not in default of payment of dues and fees, had the right to one vote on all appropriate occasions, the right to attend all conventions and membership meetings and to comment from the floor at those meetings, the right to have a representative nominated and, if elected, to serve as a member of the Board of Directors and the right to receive NRBA's publications.

Associate members were comprised of entities licensed to operate, or holding a permit for the construction of, a noncommercial AM and/or FM radio broadcast station as well as individuals, firms and

corporations involved in any way with commercial and noncommercial AM and/or FM radio broadcast stations which were not eligible for active membership. Associate members, not in default in payment of all the required dues and fees, had the right to attend and exhibit at conventions, the right to have a representative nominated as a candidate for election as a Director-at-Large and, if elected, to serve and vote as a member of the NRBA's Board of Directors, the privilege of having a representative serve on committees when appointed and of voting at the meetings thereof, and the right to receive NRBA's publications. The Commission concluded that pursuant to the NRBA's bylaws, both its active and associate members had interests and rights to participate in the organization's direction and had an obligation to help sustain the organization through regular financial contributions. Accordingly, the Commission determined that the NRBA could send the proposed letters to both its active and associate members without either instituting or becoming a political committee.

In MUR 1604, the National Rifle Association (the "NRA") filed a complaint against Handgun Control, Inc. ("HCI") and its separate segregated fund, Handgun Control PAC ("HCI-PAC") alleging that HCI solicited individuals who did not constitute members under the Act in violation 2 U.S.C. § 441b(b)(4).[27] The

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[27] The following MURs focus on the issue of the solicitation of funds by an organization for a separate segregated fund from individuals claimed to be "members." The General Counsel notes that although AIPAC does not maintain a separate segregated fund, these MURs are relevant in resolving the membership issue concerning AIPAC.

complaint alleged that HCI-PAC contributors did not play a part in the operation or administration of the corporation, elect corporate officials, have the opportunity to attend membership meetings, receive membership cards or any regular publications or newsletters, or exercise control over the expenditure of their contributions.

The HCI bylaws provided that a member was anyone who had contributed to the organization within the past 24 months. The General Counsel's report concluded, and the Commission agreed, that there was not enough evidence to indicate the existence of any members' rights vis-a-vis the corporation. *See* General Counsel's Report dated March 6, 1984. The individuals that HCI claimed to be members did not appear to have any right to participate in the direction, policy, or management of HCI. According to HCI's bylaws, the Governing Board of HCI governed and managed the corporate affairs. Moreover, the Governing Board seemed to be self-perpetuating, and the purported members did not have an opportunity to express their views to HCI by electing corporate officials or by exercising control over the expenditure of their contributions. The General Counsel noted, however, that one privilege of membership in HCI was the receipt of HCI's newsletter, Washington Report. HCI's formal corporate documents did not provide individuals with the opportunity to attend membership meetings. The only obligation for membership provided by the bylaws was that a monetary contribution be made within two years. The contribution could be in any amount. In the General Counsel's view, contributions to HCI in various amounts at sporadic intervals did not constitute support of the

organization through regular financial contributions or a significant financial attachment required to be a member.

Moreover, the reply form attached to HCI's solicitation letter did not contain an explicit invitation to become a member. Although the solicitation urged the solicitee "to join" HCI and stated that "[e]very new contributing member we add to our ranks makes our clout against the NRA much stronger," no such discussion appeared on the reply form. The reply form did not make it clear that the individual's contribution to HCI for ideological reasons resulted in membership in HCI. Furthermore, no reference was made anywhere concerning the tenure of the purported membership. Neither the reply form nor the solicitation letter discussed any aspect of membership. Based on the foregoing facts, the Commission concluded that the individuals who were solicited for contributions to HCI-PAC did not constitute members of HCI within the meaning of the Act. Accordingly, the Commission found reason to believe that Handgun Control, Inc. and Handgun Control PAC violated 2 U.S.C. § 441b(b)(4)(A)(i).

The Commission entered into pre-probable cause conciliation with the Respondents, and in July 1984 HCI and HCI-PAC signed a conciliation agreement with admissions of the violation and a civil penalty of $15,000. As part of the conciliation agreement, HCI agreed that, as requirements for membership in HCI, it would establish a predetermined minimum amount of dues which would not be less than the current "suggested dues" and that the rights of membership in HCI would include the right to participate in annual meetings and to elect a Director to the Governing Board. HCI and HCI-PAC further agreed that

they would not solicit contributions to HCI-PAC from any individual who does not constitute a member under the Act, the Regulations or the Commission's interpretation of the Act and Regulations.

On August 22, 1984, Handgun Control, Inc. filed a complaint against the NRA, the National Rifle Association-Political Victory Fund (the "NRA-PVF") and Michael K. McCabe, as treasurer, alleging that the NRA and the NRA-PVF had solicited individuals for contributions to the NRA-PVF who were not members of the NRA within the meaning of the Act in violation of 2 U.S.C. § 441b(b)(4)(A). *See* MUR 1765. The General Counsel's Report in MUR 1765 indicated that all members of the NRA appeared to be required to pay dues as a condition of membership in the NRA. *See* General Counsel's Report dated October 15, 1984. The NRA's bylaws stipulated that "the dues or minimum contributions of each class of membership shall be fixed by the Board of Directors." The General Counsel concluded that the apparent obligation of NRA members to pay minimum dues on an annual basis should be considered to be the "significant financial attachment" required to be a member under 2 U.S.C. § 441b(b)(4)(C).

The General Counsel further stated that the requisite enduring organizational attachment between purported members of the NRA and the NRA itself also appeared to exist for the following reasons. First, the Board of Directors, elected from the lifetime members of the NRA, formulated policies and had general charge of the affairs and property of the NRA. Second, since annual and lifetime members were entitled to one vote for each vacancy on the Board, the Board was not self-perpetuating. Third, although only lifetime and annual members had the

right to cast a vote in NRA affairs, the evidence indicated that all other members of the NRA had certain other rights vis-a-via the NRA.

All members were allowed to hold membership on any committee of the NRA which "consider, debate, and recommend policies, strategies, programs, rules and activities to the NRA Board of Directors." In addition, all members had the right to attend all meetings of the Board of Directors, Executive Committee and standing and special committees of the NRA. All members of the NRA also had the "privilege" of attending and being heard at all official meetings of members. Finally, all members had the right to circulate and submit petitions for nominating Directors.

Based on the above facts, the General Counsel concluded, and the Commission agreed, that it appeared that the non-voting members of the NRA exercised some control over the expenditure of their contributions and were permitted to participate in the direction, operation and policies of the NRA. Moreover, the NRA bylaws provided for: an "Annual Meeting of Members" to be held no later than November 30, of the calendar year; the issuance of an "appropriate card, certificate or insignia" to each member as evidence of membership; and a subscription to the official journal. In addition, the General Counsel found that there were certain privileges that resulted from NRA membership which included the opportunity to compete in matches and qualify for awards as well as the opportunity to request and receive advice and assistance from the NRA related to armaments.

The General Counsel also stated that the right to vote is only one type of right vis-a-vis the corporation. Where, as in this matter, voting rights were granted

to a limited number of members of a corporation without capital stock, a close scrutiny of the other existing rights and obligations is required. In MUR 1765, the Commission concluded that the NRA provided all of its members with sufficient rights, obligations, and privileges to claim the exemption of 2 U.S.C. § 441b(b)(4)(C). Accordingly, the Commission found no reason to believe that the National Rifle Association, National Rifle Association-Political Victory Fund and Michael K. McCabe, as treasurer, violated 2 U.S.C. § 441b(b)(4)(A)(i).

On January 7, 1985, Handgun Control, Inc. filed a complaint against the Citizens Committee for the Right to Keep and Bear Arms ("CCRKBA"), the Right to Keep and Bear Arms Political Victory Fund ("PVF") and Mark Challender, as treasurer, alleging that CCRKBA and PVF violated 2 U.S.C. § 441b(b)(4)(A)(i). *See* MUR 1860. On April 17, 1985, the Commission found reason to believe that the CCRKBA, and PVF and Mark Challender, as treasurer, violated 2 U.S.C. § 441b(b)(4)(A)(i) by soliciting contributions to the PVF from individuals who did not constitute members of CCRKBA within the meaning of the Act. The Commission's determination was based upon its view that those individuals who CCRKBA considered to be members did not have sufficient rights vis-a-vis CCRKBA to constitute members under the Act and that other persons considered by CCRKBA to be its members as a result of a gratuitous membership did not take an affirmative step to become a member of CCRKBA.

CCRKBA is a non-profit corporation, organized and existing under the laws of the state of Washington. The PVF is an unincorporated political committee. CCRKBA's bylaws provided that any individual who

is in agreement with the goal of CCRKBA could become a member by completing a membership form and paying annual dues of $15, 5 years dues of $50, or life membership dues of $150. Members were issued a membership card with the members' name and number. In response to the complaint, CCRKBA indicated that its members received certain benefits and privileges including the official monthly periodical, POINT BLANK, at no charge; topical publications produced by CCRKBA, some of which addressed issues or events of particular interests in the member's particular geographic area; free advice and assistance concerning firearms and training, acquisition of firearms licenses and permits, organization and gun clubs, implementation of grassroots lobbying plans and other matters; free books, pamphlets, audio and videotapes, filmstrips and other pro-gun materials for use and distribution at various forums; use of a toll free number to request information; special prices on artifacts (key rings, mugs); and general assistance, "such as the recommendation of attorneys experienced with the laws relating to guns," and the preparation of testimony for members to deliver at municipal and legislative hearings; and the right to support the PVF.

The General Counsel concluded that the apparent obligation of CCRKBA "members" to pay minimum dues on an annual basis should be considered to be the significant financial attachment required to be a member. The General Counsel stated, however, that the requisite enduring organizational attachment between the purported "members" and the CCRKBA itself was lacking. There was no evidence of the existence of any members' rights vis-a-vis the corporation. The individuals did not appear to have any right

to participate in the direction, policy, or management of CCRKBA.

Pursuant to the bylaws, the Chairman of CCRKBA determined the policy and had the general supervision of the affairs of CCRKBA subject to the direction of the Board of Directors. Furthermore, the Board of Directors seemed to be self-perpetuating and the purported members did not have an opportunity to express their views to the CCRKBA by electing corporate officials or by exercising control over the expenditure of contributions. Although CCRKBA argued that under Washington law, each member of a membership corporation was entitled to one vote on each matter submitted to a vote to the members, there was no evidence that members had ever been afforded an opportunity to vote on any matter. Moreover, CCRKBA's formal documents did not provide its members with an opportunity to vote or to attend membership meetings. Although CCRKBA members were asked for their input by way of polls, questionnaires, surveys, petitions, and other membership involvement techniques, the General Counsel indicated that such informal input was insufficient to claim the membership exemption. In addition, the authority to make, alter, amend, or repeal the bylaws was vested in the Board of Directors. CCRKBA members had never been presented with the opportunity to elect corporate officials nor to cast a binding vote in CCRKBA affairs. CCRKBA's formal documents did not even provide its members with the opportunity to attend membership meetings.

In MUR 1860, the Commission also focused on the issue of whether those individuals considered by CCRKBA to be its members "knowingly" had taken "some affirmative steps" to become a member. The

solicitation letters and forms referred to membership in CCRKBA. A return form in CCRKBA's magazine included the language "Why not help CCRKBA to continue to grow in size by signing up at least one additional member. . . ." In response to the Commission's reason to believe findings with regard to this issue, CCRKBA indicated that recipients of gratuitous memberships were mailed a letter informing them of their gift membership thereby presenting them with an opportunity to revoke their membership and were not solicited by PVF. Accordingly, the General Counsel recommended that the Commission take no further action with respect the gratuitous memberships.

The General Counsel concluded, and the Commission agreed, that the structure of CCRKBA's organization did not provide its other purported members with sufficient rights vis-a-vis CCRKBA to claim the membership exemption of 2 U.S.C. § 441b(b)(4)(C). The Commission found probable cause to believe that the Citizens Committee for the Right to Keep and Bear Arms, the Right to Keep and Bear Arms Political Victory Fund and its treasurer violated 2 U.S.C. § 441b(b)(4)(A)(i). On June 4, 1986, the Commission accepted a conciliation agreement in this matter which included an admission of the violation, a civil penalty of $1,500, and an agreement that the Citizens Committee for the Right to Keep and Bear Arms and the Right to Keep and Bear Arms Political Victory Fund would not solicit any individual who did not constitute a "member" within the meaning of the Act.

1. Individuals Financial Attachment to AIPAC

In 1951, the American Zionist Council ("AZC") established an independent lobbying organization. In 1954, AZC formed a separate full-time lobbying organization known as the American Zionist Committee of Public Affairs, which in 1959 changed its name to AIPAC. AIPAC was incorporated in 1963 and, in AIPAC's words, became a membership organization open to individual participants in 1969.

According to its bylaws, amended and approved on November 14, 1989, AIPAC's stated purpose is to "undertake appropriate activities to maintain and further the friendship between the United States and Israel and to strengthen and promote the mutual ideals and interests of both nations, *in accordance with the views of its members.*" *See* AIPAC's Bylaws at Section 1(a) (emphasis added) (Exhibit 1 to AIPAC's Response to the Request by the Commission to Answer Interrogatories and Produce Documents). AIPAC indicates that its sole function as a registered domestic lobby is to encourage close United States-Israel relations and to provide services to its own "members."

According to its bylaws, "members" of AIPAC include:

> (1) Individuals for whom a membership application, form or card has been completed and who pay annual dues as set by the Executive Committee. In setting dues, the Executive Committee may create different categories of membership depending upon the amount of dues paid; and

> (2) The chief lay officer of each organization that is a member of the Conference of Presidents of Major American Jewish Organizations may become a member without payment of dues.

Pursuant to the bylaws, membership must be renewed on a yearly basis through the payment of dues. *See* AIPAC's Bylaws at Section 1(a). According to AIPAC, annual membership dues are a minimum of $50. Students may join by completing the membership form and paying a minimum of $15 in annual dues. The "chief lay officer" of an organization that is a member of the Conference of Presidents of Major American Jewish Organizations may join without the payment of dues. According to the supplemental information provided by AIPAC on May 7, 1990, representative organizations of the Conference of Presidents include groups such as the Anti-Defamation League; the American Jewish Congress, Hadassah; and the National Conference of Soviet Jewery. AIPAC notes that the chief lay officers are entitled to automatically serve on AIPAC's Executive Committee.[28] In supplemental information filed by AIPAC, AIPAC indicates that 45 chief lay officers currently serve on the Executive Committee in an *ad personam* capacity.

When an individual joins AIPAC, two cards are completed which pledge the payment of annual dues or a larger amount. These cards form the basis of the membership records which are maintained by AIPAC.

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[28] AIPAC indicates that while the membership of a chief lay officer is by virtue of an organizational role, the membership is held in an individual capacity. The organization itself has no status in AIPAC.

The first card is filled out entirely by the individual. The second card is partially pre-completed by computer "with name, address, and other information." Individuals who join in this manner normally do so at AIPAC meetings or other sessions where they are recruited. According to AIPAC, many individuals also join by sending in membership dues with a form from AIPAC's brochure. AIPAC notes that a "substantially smaller number" of individuals join in response to membership forms included in prospect mail solicitations. AIPAC has submitted sample membership forms and pledge cards. *See* AIPAC's Response to the Commission's Interrogatories - Exhibit 2. AIPAC's membership form states "YES! I want to support AIPAC and help strengthen the U.S.-Israel relationship. Enclosed are my basic membership dues of $50 or my larger contribution." AIPAC's sample pledge form does not refer to membership. AIPAC has also submitted its membership solicitation mailings from February 1983 through Fall of 1989. *See* AIPAC's Response to the Commission's interrogatories - Exhibit 5. AIPAC's October and November 1989 mailing states:

> AIPAC members are the key to our effectiveness—they distinguish the pro-Israel lobby from every other lobby in Washington. Members of Congress know that our membership—50,000 strong—represents a nationwide pro-Israel constituency who know the issues, demand action, and monitor the results. . . . AIPAC members invite you to join us. An AIPAC membership begins at just $50 per year. Frankly, we don't think you could get more "bang for your buck" anywhere else.

In its Summer and Fall 1986 mailings, AIPAC indicates that:

> Although AIPAC is not a political action committee (a PAC), it closely monitors each Senate and House campaign throughout the country and makes sure that every candidate, Democrat and Republican, receives factual information about Israel and its struggle. Through the *Near East Report*, which it distributes, AIPAC ensures every AIPAC member as well as members of Congress, the Administration, and the diplomatic community, hears the pro-Israel point of view.

Membership must be renewed yearly. AIPAC sends out five notices of late payment and then drops the individual from AIPAC's membership roles if payment is not made. AIPAC has submitted the following information with regard to the total number of individuals belonging to AIPAC:

Year	Members
1983	23,656
1984	33,082
1985	37,155
1986	37,195
1987	32,477
1988	36,524
1989	37,104

AIPAC notes that it used a conservative methodology to determine these numbers.[29] The above figures

[29] Each AIPAC membership application provides a space for the applicant to enter the name of the person or persons joining. In many instances, only one person is listed, yet the name of the spouse or the names of other person in the household are listed elsewhere as part of the general information

do not include the several thousand students who belong to AIPAC.[30]

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maintained on the individual who joins. In such instances, the membership figures above include only the individual actually identified on the form in the space provided for the name, even though other persons in the household may consider themselves as belonging to AIPAC. In addition, the membership form may include the name of both spouses. Only in these cases were both spouses included in the above figures.

[30] According to AIPAC's response to the Commission's interrogatories, AIPAC's fiscal year did not conform to the calendar year until 1988. From 1983 through 1986, AIPAC's fiscal year began March 1st and ended February 28th. AIPAC indicates that 1987 was a transitional year. Accordingly, 1987 was a shortened fiscal year from March 1st through December 31st. The following information provided by AIPAC includes contributions from individuals as well as contributions from persons who gave under $50. Contribution data for others is not kept separately. In 1989, approximately $190,000 of AIPAC's funds came from persons who contributed less than $50. AIPAC received the following funds in dues and contributions:

Year	Membership Dues/Contributions
1983	$4,001,748
1984	$4,998,803
1985	$5,768,895
1986	$6,136,219
1987	$6,179,044
1988	$8,926,820
1989	$9,910,632

AIPAC's additional income is limited to the following interest and income income derived from the sale of the AIPAC Monograph Series:

Year	Interest Income	Miscellaneous Income
1983	$ 70,153	$41,865
1984	$108,602	$29,171
1985	$ 47,014	$ 9,190
1986	$ 20,766	$ 2,157
1987	$ 15,471	$32,520
1988	$ 43,688	$11,885
1989	$ 76,612	$ 487

Although AIPAC's bylaws permit the Executive Committee, which acts as the Board of Directors of AIPAC, to create different classifications of membership based on the amount of dues paid, AIPAC asserts that it does not have any classifications of membership. According to AIPAC's response, AIPAC's bylaws do not entitle individuals who contribute in excess of the $50 membership dues ($15 for students) to rights in the organization that are in addition to or exclusive of the rights of all other contributors. AIPAC further notes, however, that individuals who do make contributions in excess of their annual dues are invited to participate in special programs including private briefings by AIPAC's senior staff, special dinners and receptions.

According to AIPAC, individuals who belong to AIPAC enjoy special benefits and privileges not available to others. They are entitled to receive notice of AIPAC's Annual Policy Conference where they directly participate in setting policy and direction of AIPAC by debating and voting on AIPAC's Policy Statement. The Policy Conference also offers educational and policy forums.

These individuals may also participate in local AIPAC activities including receptions with AIPAC speakers, elected officials and dignitaries. AIPAC also notes that persons interested in joining AIPAC are sometimes invited to attend these local activities. In addition, they may attend regional political work-

shops designed to encourage them to become involved in state and local politics, disseminate nonpartisan information about federal election campaigns, and educate themselves about the political process. Persons interested in joining AIPAC may attend these workshops for a fee. Since 1983, AIPAC has held numerous such workshops.

Individuals who join AIPAC may also participate in one day educational seminars in Washington which include briefings by AIPAC staff and lobbying appointments with Congress. AIPAC notes that these seminars are not available to others. Moreover, AIPAC has organized community caucuses, AIPAC's grassroots lobbying organizations, in 25 percent of the Congressional districts for these individuals. Caucuses receive topical information about U.S. foreign policy in the Middle East and candidate voting records. Caucus meetings are sometimes attended by others on an occasional and isolated basis. The following publications are also available to those who join AIPAC:

1. comprehensive information regarding voting records of Congress prepared on an allegedly nonpartisan basis (not available to others);

2. information regarding polls, political analyses, newspaper clips and candidate position papers (not available to others);

3. weekly compilation of news articles relevant to U.S.-Israel relations (not available to others);

4. Action Alerts - describing information affecting U.S.-Israel relations that recipients are asked

to contact their representatives about (also distributed to Jewish community leaders);

5. Near East Report - weekly publication (others may purchase a subscription for $30 from the publisher);

6. *Myth and Facts* - question and answer book about the Middle East (others may purchase for $4.85);

7. AIPAC Monograph - series of studies on topic relating to U.S.-Israel relationship. Complimentary copy when joining; subscription offered at rate discounted from rate offered to the public;

8. monthly legislative report (not generally available to others);

9. annual legislative report (not generally available to others);

10. topical memoranda on issues affecting the U.S.-Israel (not generally available to others).

AIPAC's membership solicitations indicate for a contribution of more than the $50 membership dues, an individual will receive additional benefits. *See* AIPAC's Response to the Commission's Request to Answer Interrogatories and Produce Documents - Exhibit 2. For a contribution of $100 or more, an individual receives Near East Report and Myths and Facts plus one of AIPAC's papers on U.S.-Israel Relations, "a monograph series on the strategic value of Israel, the campaign to discredit Israel in the U.S. and other issues of current concern." For a contribution of $500 or more, they receive all of the above

plus periodic mailings of legislative updates from AIPAC's Legislative Director and Executive Director. For a contribution of $1,000 or more, in addition to the material discussed above, they receive membership in AIPAC's Washington Club which "entitles [them] to private briefings in the AIPAC office by a member of AIPAC's senior staff. For a contribution of $3,000 or more, they receive all of the above plus membership in AIPAC's Capitol Club which entitles them to participate in "exclusive meetings and events which have included such programs as a reception with the Vice President, a reception at the State Department, and a dinner with the Israeli Ambassador." Finally, a contribution of $10,000 or more entitles them to receive all of the above plus membership in AIPAC's Senate Club. The Senate Club's programs have included "private dinners in the homes of leading Senators and other small social gatherings with members of the Senate."

2. Individuals' Rights to Participate in the Governance of AIPAC

In response to the Commissions's interrogatories concerning individuals' participation in the governance of the organization, AIPAC indicates that individuals who join AIPAC may serve as an Officer of AIPAC or on one of its committees and may vote on AIPAC's Policy Statement, its governing document, at AIPAC's annual Policy Conference. The corporate structure of AIPAC consists of the Executive Committee, the Officers, the National Council and the State Chairs. AIPAC's internal staff consists of the Executive Director, the Legislative Department, the Foreign Policy Issues Department, the Political

Department, the Development Department and the Finance Department.

a. The Executive Committee

The bylaws indicate that the Executive Committee, acting as the board of directors, controls the policy, affairs and property of AIPAC. AIPAC's bylaws - Section 2(a). The Executive Committee presently has 190 members. According to the bylaws, the chief lay officer of each organization that is a member of the Conference of Presidents of Major American Jewish Organizations is invited to serve as a member of the Executive Committee in an *ad personam* capacity. In supplemental information filed by AIPAC, AIPAC indicates that the number of chief lay officers on the Executive Committee, excluding AIPAC's President, currently stands at 45.[31] The bylaws further indicate that for each lay officer who is invited to serve on the Executive Committee, there shall be not more than 5 other members of the Executive Committee, including up to six persons who shall be appointed directly by the President. Additional Executive Committee members are nominated by the Nominating Committee and elected for a term of one year by a majority of those Executive Committee members present and voting. In selecting members to serve on the Executive Committee, the Executive Committee takes into account "political activity, support of AIPAC, community leadership and state geographical distribution." AIPAC's Bylaws at 2(c). According to the bylaws, no member of the Executive Committee

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[31] The General Counsel notes that the payment of dues requirement is waived for those chief lay officers according to AIPAC's bylaws. AIPAC's Bylaws at Section 1(a)(2).

may serve for longer than 5 consecutive terms. Any member who serves 5 consecutive terms may be re-elected after a one year's absence from the Executive Committee. The Executive Committee meets four time a year to set policy and to approve fiscal and corporate matters including budgets, bylaws, nominations and resolutions. The Executive Committee also reviews, debates, and votes on AIPAC's Policy Statement prior to the Policy Statement being submitted to the membership in attendance at the Annual Policy Conference.

According to AIPAC's response to the Commission's interrogatories, individuals who belong to AIPAC routinely communicate with the Executive Committee to urge Executive Committee members to adopt or to present to the full Executive Committee a particular point of view. AIPAC further indicates that Executive Committee members regularly offer letters or present other communication from non-Executive Committee members to the full committee for further consideration. In addition, such individuals may attend and be heard at the official meetings of the Executive Committee.

b. The Nominating Committee

The Nominating Committee is a standing committee consisting of seven members. AIPAC's Bylaws at Section 7(c). The President of AIPAC appoints the Chairman and three members of the Nominating Committee.[32] The three other members are

[32] The President also appoints two alternates to the Nominating Committe.

appointed by the Committee of Officers.[33] At least two members of the Nominating Committee must also be members of the Executive Committee. According to AIPAC, the balance of the Nominating Committee may come from AIPAC members at large.[34] AIPAC's Supplemental Response submitted on May 7, 1990. According to AIPAC, any individual who belongs to AIPAC may lobby or submit to the President or Committee of Officers the name of any other such individual to fill the five remaining seats. AIPAC's bylaws also provide that other members of the Executive Committee may submit additional nominations, as long as their submissions contain the signatures of no fewer than 20% of the members of the Executive Committee.

AIPAC indicates that each year the Nominating Committee submits its nominees for the entire membership of the National Council and Executive Com-

[33] The Committee of Officers is a standing committee which consists of the Officers of AIPAC and the Executive Director. The Committee of Officers is responsible for deciding substantive and administrative issues, choosing AIPAC's auditors, reviewing the budget, and providing guidance to the Executive Director. AIPAC's Bylaws at Section 7(b).

[34] According to AIPAC, the bylaws were modified with respect to the Nominating Committee in 1989. Before the modification, the bylaws required that two members of the Nominating Committee were to be chosen from among the Presidents of the organizations which are members of the Conference of Presidents of Major American Jewish Organizations. Since these people rarely attended or participated in Nominating Committee meetings, the bylaws were amended to omit this requirement.

mittee.[35] In addition, the Nominating Committee nominates approximately one-third of AIPAC's officers.[36] According to AIPAC, nominations for the National Council, the Executive Committee, and officers are based upon an individual's commitment to AIPAC. For example, the Nominating Committee will look to see if an individual has hosted an AIPAC fundraiser, led a Congressional Caucus, participated in grassroots educational events about the U.S.-Israel relationship, and demonstrated a financial commitment to AIPAC. Generally, the regional and national staff of AIPAC initially submit nominations. These nominations are forwarded to AIPAC's officers who review the names and submit additional nominees. Members of the Executive Committee may also submit names for nomination. AIPAC indicates that there is substantial lobbying on the part of individuals who belong to AIPAC for positions on the National Council, Executive Committee and as officers. AIPAC notes that members of the Executive Committee and National Council and officers have essentially "risen through the ranks." Moreover, leaders typically have been active on a regional basis serving first as a regional community leader, then a regional leader, and ultimately serving in a leadership position at AIPAC's national level.

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[35] AIPAC notes that members of the Executive Committee who sit by virtue of their presidency of one of the organizations that are members of the Conference of Presidents of Major American Jewish organizations are not nominated by the Executive Committee.

[36] AIPAC notes that only one third of the officers are nominated because unlike members of the Executive Committee and the National Council who serve for one year terms, officers of AIPAC serve staggered two years terms.

c. AIPAC's Officers

AIPAC currently has 23 officers including the President, the Chairman of the Board, the Chairman of the Board Emeritus, ten Vice Presidents, the Secretary, the Treasurer, and eight Regional Vice Presidents. AIPAC's Bylaws at Section 3. Officers of AIPAC are nominated by the Nominating Committee and elected by the Executive Committee. Officers serve for a two year term and may not serve more than three consecutive terms.[37] Only one third of the officers are rotated off at any one time.

d. The National Council

According to AIPAC's response, members of the National Council may only be chosen from those who belong to AIPAC. *See* AIPAC's Bylaws at Section 6. National Council members are nominated by the Nominating Committee and elected for a one year term by the Executive Committee present and voting. Members of the National Council are limited to serving for five consecutive terms. AIPAC's National Council currently has 190 members. According to AIPAC's response, any individual who belongs to AIPAC who has been duly nominated by the Nominating Committee and who has demonstrated support for AIPAC and political involvement may be elected to the National Council. AIPAC notes that although the National Council is only an advisory board, it is generally regarded as the leadership base from which individuals may proceed to the other levels of AIPAC.

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[37] AIPAC's bylaws note that if the Officer is elected President or Chairman of the Board or is serving as Chairman of the Board or as Chairman of a major committee, the officer is entitled to serve two additional consecutive terms.

In addition, AIPAC indicates that all who belong to AIPAC may circulate nominating petitions or lobby members of the Nominating Committee or the Executive Committee in support of individuals to serve on the National Council. Moreover, any such individual may attend National Council meetings, which generally occur only once a year.

e. AIPAC's Standing Committees

According to AIPAC's response to the Commission's interrogatories, any individual who belongs to AIPAC, upon appointment by AIPAC's President, may serve on one of several standing committees which directly govern specific functions of AIPAC. They lobby the President, Executive Committee or National Council to serve on these standing committees. The *Management Committee* oversees AIPAC's annual budget and internal operations. The *Strategic Planning Committee* recommends to the Committee of Officers policy objectives and strategies for implementation. The *Grassroots Committee* oversees the grassroots operation of the Political Department and its programming. The *Lobbying Committee* oversees the lobbying operation of the Legislative Department and its agenda. The *Political Education Project Committee* oversees the political activities and educational programs of the Political Department. The *Development Committee* oversees fundraising programs in support of AIPAC's operations on the local, regional and national levels. Finally, the *Cash Collections Committee* oversees the payment of membership pledges.

f. Regional Offices

AIPAC also maintains six regional offices in Florida, New York, the Southeast, the Pacific Northwest, the Southern Pacific, and the Southwest. According to AIPAC's response, each office has its own governing structure which oversees the operations. In addition, local committees assist the local and national staff in planning and implementing fundraising events, educational meetings, caucuses and workshops. Moreover, the regional governing bodies meet frequently to hear a report from AIPAC's regional and national staff and to review operations and activities of the regional office. According to AIPAC, hundreds participate in regional governing bodies.

g. State Chairs

AIPAC's State Chairs are responsible for raising funds, developing and recruiting members, and establishing relations with community leaders and officials. The State Chairs are recruited from individuals who belong to AIPAC and play a role in determining the needs of members in the states.

h. Key Contacts

AIPAC also states that such individuals participate in AIPAC as "key contacts." Key Contacts are those who have strong relationships with Congressmen, Congresswomen, and other government officials.

i. AIPAC's Annual Policy Conference

In addition to the opportunity to serve on one of AIPAC's committees, AIPAC states that each individual who belongs to AIPAC who attends AIPAC's Policy Conference may vote on AIPAC's annual Policy Statement. AIPAC's annual meeting, its Policy

Conference, is held each year in the spring and lasts from mid-day Sunday until mid-day Tuesday. In 1989, over 2,000 such individuals attended the conference. The Policy Conference includes large plenary sessions and smaller workshops.[38]

According to AIPAC, its annual Policy Statement documents and governs AIPAC's overall policy and direction. When new issues arise, AIPAC's officers, Executive Committee, and senior staff routinely consult the Policy Statement for policy guidance. *See* AIPAC's Response to the Commission's Interrogatories at 12. AIPAC's Policy Statement is initially drafted by the staff of AIPAC's Foreign Policy Issues Department. The draft is then circulated to the senior staff of AIPAC for its review and revision. *See* AIPAC's Supplemental Response submitted May 7, 1990. The draft is next forwarded to a committee of four or five members of the Executive Committee for further review and revision. AIPAC notes that although this committee is not mandated by AIPAC's bylaws, its review function has become customary in the drafting of the Policy Statement. Following the committee's review, the draft Policy Statement is then mailed to AIPAC's full Executive Committee. AIPAC mails the Policy Statement to the Executive

[38] AIPAC indicates that major figures from the Administration an Congress address the plenary sessions and at least one Israeli dignitary also addresses the conference. In addition, AIPAC holds smaller workshops that explain how to get involved in politics, the "nuts and bolts" of citizen lobbying, and in-depth examinations of topics related to the U.S.-Israel relationship. In addition, a series of individual lobbying meetings are held in which almost all the delegates participate. In 1989, AIPAC delegates attended approximately 250 appointments which members of Congress.

Committee several weeks before the actual Policy Conference to give Executive Committee members an opportunity to review the Policy Statement.

At the Sunday noon meeting preceding the opening of the Annual Policy Conference, the full Executive Committee meets to debate and discuss the draft Policy Statement in detail. After this meeting, the various changes voted upon by the Executive Committee are incorporated into a new draft. This draft is then circulated to all participants at the Policy Conference for their review. Those attending the Conference have an opportunity to debate and revise the draft of the Policy Statement. AIPAC states that the floor debates have led to substantial revisions of the draft approved by the Executive Committee. AIPAC notes, for example, that in 1985, Conference participants took vigorous exception to the proposed organizational policy on arms sales when many believed that the Policy Statement was too weak. According to AIPAC, the floor debate that ensued changed the Policy Statement. All in attendance at the Policy Conference then vote on the Policy Statement at the Tuesday noon session.

AIPAC's Annual Policy Statement sets out the policy goals for AIPAC in the coming year. For example, the 1989 Policy Statement suggests that AIPAC will strive to:

> 1. promote peace between Israel and its Arab neighbors through direct negotiations. . . .;
>
> 2. maintain the necessary levels of U.S. economic and military assistance in grants to Israel;

3. enhance strategic cooperation between the U.S. and Israel;

4. oppose the sale of sophisticated U.S. arms to Arab countries in a declared state of war with Israel;

5. support our government's efforts to work with Israel and other allies to thwart the spread of the PLO and other international terrorism;

6. increase and strengthen economic cooperation between Israel and the U.S.;

7. support efforts to end the Arab economic boycott of Israel and enforce compliance with anti-boycott laws;

8. encourage the U.S. to maintain its principled leadership in support of Israel at the United Nations;

9. ensure the right of free emigration of Jews from the Soviet Union, Syria, Ethiopia, the Yemen Arab Republic and other lands of oppression;

10. support efforts to move the U.S. Embassy from Tel Aviv to Jerusalem. . .;

11. promote an energy security strategy for the U.S. which would encourage conservation and the exploration and the development of existing and alternative energy sources in order to reduce dependence on unstable foreign sources.

See AIPAC's 1989 Policy Statement.

C. Individuals Who Belong to AIPAC Do Not Qualify as Members for Purposes of the Act

AIPAC asserts that it not only has a constitutional right to communicate its political views in connection with a federal election to its "members," but that it also has a constitutional right to "identify the people who constitute the association" as well as the "determination. . . of the structure which best allows [the association] to pursue its political goals."[39] AIPAC further claims that the Commission's regulation at 11 C.F.R. § 114.1(e), which defines "member" as "all persons who are currently satisfying the requirements for membership in a membership organization, trade association, cooperative or corporation without capital stock," is an implicit recognition of the fact that the Commission "could not constitutionally substitute its own judgment for that of an association."

AIPAC maintains that in examining whether contributors and supporters of AIPAC are "members" for purposes of the Act, "the only precedent upon which the Commission or AIPAC may rely is the regulation defining member." It contends that "Advisory Opinions offer no factually identical situation and in

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[39] AIPAC cites to cases involving political parties for its support of these propositions. They are *Eu v. San Francisco City Democratic Central Committee*, 109 S.Ct. 1013, 1021 (1989), *quoting Tashjian v. Republican Party of Connecticut*, 107 S.Ct. 544, 548 (1986), *quoting Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981) as well as *Tashjian*, 107 S.Ct. at 549. The General Counsel believes such cases are distinguishable in that, while they more appropriately dealt with the constitutional right of association, they apply to political party organizations rather than nonprofit corporations.

fact address only the non-constitutionally protected area of solicitations for a separate segregated fund." AIPAC further asserts that because constitutionally protected First Amendment rights are at stake in the issue, proscribed conduct must be clearly delineated in order "to give individuals a fair warning of the conduct that is required in order to prevent government officials from enforcing the law in an arbitrary or discriminatory fashion."

AIPAC adds that it has "scrupulously limited any and all communications that might remotely be considered partisan to those individuals who satisfy the requirements for membership in AIPAC, as defined by AIPAC's bylaws and as required by the FEC." It further notes:

> In addition to the fact that the quantum of communications by AIPAC that the Commission might even consider to be partisan is small, to find that AIPAC's alleged partisan communications were illegal on the grounds that they were made to individuals who failed to meet a standard for membership other than the one promulgated by the Commission would be a violation of AIPAC's members' rights as guaranteed by the First and Fourteenth Amendments of the Constitution."

AIPAC seeks to distinguish between communications soliciting individuals for contributions to a separate segregated fund and other types of communications of a partisan nature. It claims that Commission precedent and court opinions, such as *NRWC*, have only related to solicitations. AIPAC cites to a comment in *MCFL*, where the Court stated that it has "consistently held that restrictions on contributions require less compelling justifications than restrictions on

independent spending." On this basis AIPAC sees "a clear constitutional difference between the right of the government to restrict the rights of members for purposes of soliciting contributions to a separate segregated fund as opposed to restrictions affecting communications to an organization's membership."

The General Counsel notes that the statutory group to whom corporations can make "communications . . . on any subject" and the group from whom it may solicit contributions to a separate segregated fund are given parallel definitions: executive or administrative personnel and their families and members and their families. Compare 2 U.S.C. § 441b(b)(2)(A) with 2 U.S.C. §§ 441b(b)(4)(A)(i) and 441b(b)(4)(C). Furthermore, the Commission has not distinguished between communications soliciting contributions to the separate segregated fund and other communications of a partisan nature in defining the class the persons to whom such communications may be directed. See, Advisory Opinions 1982-2, 1984-13, 1987-29, and 1988-38.

The General Counsel also notes that in addressing who may receive a corporation's partisan communications, the Commission has not deferred to the corporation's own determination. Instead, in analyzing the membership issue, the Commission has examined whether the members have a significant financial and an enduring organizational attachment to the organization and a right to participate in its governance in a manner akin to that of stockholders in a corporation or members of a labor organization. *See NRWC*, 459 U.S. at 204. The Commission has also required that an individual must knowingly take some affirmative

steps to become a member of an organization. *See* Advisory Opinion 1977-67.

a. Individuals Who Belong to AIPAC Make a Predetermined Financial Commitment to AIPAC

In the present matter, it appears that most individuals who join AIPAC pay a minimum amount of $50 in annual dues. *See* AIPAC's Bylaws at Section 1(a). Student members pay a minimum of $15 in annual dues. AIPAC waives the dues payment requirement for the "chief lay officer" of organizations that are members of the Conference of Presidents of Major American Jewish Organizations. According to AIPAC's response, this waiver involves only 45 chief lay officers who also serve on AIPAC's Executive Committee.[40] With the exception of these chief lay officers, it appears that the apparent obligation of individuals to pay a minimum amount of dues to AIPAC on an annual basis constitutes a significant financial attachment.

b. Individuals Who Belong to AIPAC Take Affirmative Steps to Join AIPAC

AIPAC indicates that it enlists persons as "members" by recruitment at AIPAC meetings and by individuals' submitting membership dues with a form from AIPAC's brochure. This membership form explicitly states that a contribution of $50 or more entitles an individual to membership in AIPAC. AIPAC's pledge cards do not specifically refer to a pledge

[40] As noted earlier, AIPAC indicates that it had approximately 37,104 members in 1985.

resulting in membership in the organization. AIPAC further indicates that a small number of individuals join in response to AIPAC's mail solicitations. As noted earlier, these mail solicitations indicate that an individual becomes a "member" of AIPAC for a $50 contribution. *See* MUR 1604 and MUR 1860. The General Counsel notes, however, that 45 chief lay officers of each organization that is a member of the Conference of Presidents of Major American Jewish organizations automatically become "members" of AIPAC and its Executive Committee without paying dues or taking any affirmative steps to join. Therefore, based on the foregoing information, it appears that most individuals do take some affirmative steps to join AIPAC.

With the payment of dues, individuals are entitled to certain rights and privileges in AIPAC. They are entitled to receive notice of and participate in AIPAC's Annual Policy Conference. They may also take part in local AIPAC activities including receptions with AIPAC speakers, elected officials and foreign dignitaries. They may also attend regional political workshops and community caucuses. In addition, they may participate in educational seminars at AIPAC's headquarters in Washington. AIPAC also provides various publications, including information with regard to the voting records of Congress, to them. As indicated earlier, contributions in excess of the $50 minimum dues entitles these individuals to additional benefits such as private briefings with AIPAC staff, receptions, and dinners with Administration officials and Senators.

c. Individuals Who Belong to AIPAC Have Insufficient Rights to Participate in the Governance of AIPAC

With regard to rights to participate in AIPAC's governance, the General Counsel notes that individuals who belong to AIPAC do not vote for the Executive Committee members (AIPAC's Board of Directors), the National Council members, or the officers. They are nominated by AIPAC's Nominating Committee to serve in these positions. The Nominating Committee includes seven persons. The President of AIPAC appoints the Chairman and three members of the Nominating Committee. As noted earlier, the Committee of Officers appoints the remaining three members. At least two members of the Nominating Committee must also serve on AIPAC's Executive Committee. AIPAC indicates, however, that any individual who belongs to AIPAC may lobby or submit to the President or Committee of Officers the name of any such individual to fill the five remaining seats on the Nominating Committee.

According to AIPAC, the regional and national staff of AIPAC initially submit nominations of persons to serve on AIPAC's Executive Committee, National Council, or as an officer to the Nominating Committee. In addition, members of the Executive Committee may also submit names for nominations. AIPAC indicates that there is substantial lobbying on the part of individuals for positions on the Executive Committee, National Council, and as officers. AIPAC does not indicate, however, that AIPAC "members" may actually nominate other "members" to serve in these various positions. Moreover, the Executive Committee is responsible for electing itself, the National Council members, and the Officers of AIPAC. *See* AIPAC's Bylaws at Section 2(c), Section 3(b) and Section 6(c). Accordingly, it appears that AIPAC's Executive Committee is self-perpetuating. *See* MUR 1604 and MUR 1860.

AIPAC further states that upon appointment by the President, any individual who belongs to AIPAC may serve on several standing committees which oversee AIPAC's budgets, internal operations, grassroots activities, lobbying operation, political activities, education programs, fundraising programs, and membership pledges. Moreover, local AIPAC "members" oversee the operation of six regional offices. They work with local and national staff to plan fundraising events, caucuses, and workshops. AIPAC's State Chairs are responsible for fundraising, recruiting members, and developing relationships with community leaders.

AIPAC further asserts that individuals who belong to AIPAC participate in the governance of the organization by voting on AIPAC's Annual Policy Statement at its annual Policy Conference. They are entitled to receive notification of the conference in order to attend. According to AIPAC, those in attendance debate and revise a draft of the Policy Statement, which has previously been approved by the Executive Committee, prior to voting on it. AIPAC indicates that this Policy Statement governs the organization's overall policy and direction. Moreover, according to AIPAC, its officers, Executive Committee members, and senior staff routinely consult the document for policy guidance.

Although these individuals pay a predetermined amount of dues to the organization, they do not have

an opportunity to vote for the Executive Committee, AIPAC's governing body, the National Council, AIPAC's advisory committee, or AIPAC's officers. Although the adoption of the Policy Statement is significant, only a small portion of those who belong to AIPAC are present at the Policy Conference to vote on it. Based on the foregoing facts, it appears that such individuals do not have sufficient rights in the governance of the organization to qualify as members under the Act.

d. Conclusion

Therefore, because the General Counsel concludes the persons AIPAC considers its "members" do not qualify as members under the Act for purposes of 2 U.S.C. § 441b, the General Counsel further concludes that AIPAC's activities conducted with and in support of federal candidates involving communications to these individuals are prohibited by 2 U.S.C. § 441b(a). The General Counsel further concludes that AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and does not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

D. AIPAC's Does Not Qualify for the MCFL Exemption

Because of the conclusion that those who belong to AIPAC are not members under the Act and that therefore AIPAC's campaign communications have been made outside its restricted class, the issue arises whether AIPAC qualifies for the exception to Section 441b carved out by the Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). In this case, the Court said three criteria needed to be met for nonprofit, nonstock corporations to qualify for the exception to Section 441b's prohibition:

> First, it was formed for the express purpose of promoting political ideas, and can not engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including indirect expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as a conduits for the type of direct spending that creates a threat to the political marketplace.

Id. at 263-64. The Court acknowledged that the class of organizations which would meet this test would likely be very small. *Id.* at 264. *See also, Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391 (1990).

AIPAC first suggests that *MCFL* would not apply to its situation because it makes partisan communications only to its "members" and because the prohibition of Section 441b does not apply to this matter since AIPAC has not expressly advocated the election or defeat of a candidate for federal office. AIPAC further posits that even if *MCFL* were to apply, AIPAC meets the criteria established by the Court.

The General Counsel notes that the determination that individuals who belong to AIPAC are not "members" under the Act leads to the conclusion that AIPAC's partisan communications, including those coordinated with candidates, have been made to the general public. Furthermore, it would appear that some of AIPAC's communications would constitute express advocacy, in that they solicited contributions on behalf of candidates. Some were also coordinated with candidates. See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). Therefore, it is necessary to examine whether AIPAC meets the criteria of *MCFL*.

The General Counsel notes at the outset that the Court designed the exception to Section 441b to assist small organizations which, overburdened by the reporting requirements of the Act, might be forced to limit their political speech. *MCFL* at 255. The Court described MCFL as an organization with less than 6,000 contributors, which raised its funds through

devices such as cake sales. AIPAC, however, is a large organization with more than $37,000 members in 1989 and annual revenues of more than $9,987,000 in 1989 with annual dues of at least $50 per person (except for student members). In the General Counsel's view, whether *MCFL* is meant to apply to entities such as AIPAC, an organization many times the size of MCFL, remains an open question. With this in mind, the General Counsel turns to whether AIPAC meets the three-prong *MCFL* test.

1. AIPAC's Purpose

The Commission's factual and legal analysis issued along with the reason to believe finding noted that AIPAC was a registered domestic lobbying organization "formed for the express purpose of promoting political ideas and not for conducting business activities." Thus, the Commission has previously recognized that AIPAC meets the first prong of the *MCFL* test. Its amended By-Laws describes AIPAC's purpose as undertaking "appropriate activities to maintain and further the friendship between the United States and Israel and to strengthen and promote the mutual ideas and interests of both nations, in accordance with the views of its members." AIPAC further notes that it "is funded by the annual dues of individuals who are fully aware of AIPAC's political purposes and who contribute precisely because they support those purposes."

2. Shareholders

AIPAC contends that it also meets the second prong of the MCFL test in that it "is a qualified nonprofit, incorporated membership organization that has no shareholders or members who have a claim on

any of AIPAC's assets." AIPAC has submitted an affidavit from Roy Rosenbaum, AIPAC's policy and development director since 1986. He states that his "responsibilities include reviewing the fiscal operations of AIPAC as well as AIPAC's audited financial statements." He states that AIPAC "has no shareholders or members who have a claim on any of AIPAC's assets or earnings." Thus, the General Counsel concludes that AIPAC meets the second prong of the *MCFL* test.

3. Corporate or Union Contributions

AIPAC also claims that it meets the third prong of the *MCFL* test. It states that it "was not established by a business corporation or labor organization, but began as an independent lobbying organization formed by the American Zionist Council." It only allows individuals to join the organization. AIPAC further notes that "unlike the policies adopted by other organizations AIPAC does not have a policy of actively soliciting and accepting corporate funds, whether in the form of donations or the purchase of advertising space in its publications; nor does AIPAC have a policy of openly embracing corporate members."

AIPAC acknowledges, however, that "some individual members do choose to pay their membership dues through their personal corporate accounts or have their dues paid for by other corporations." Nevertheless, AIPAC argues that such amounts are *de minimis* and that AIPAC has never regarded such payments as anything other than payments for an individual membership. AIPAC has stated that it "received 73 corporate checks in 1987 (one-half year), 159 checks in 1988 and 152 checks in 1989." It adds that these "corporate checks represent approxi-

mately 5.3%, 4.7% and 3.7% of total contributions for each respective year."[41] AIPAC also notes that there has been a limited number of corporate "patrons" listed in the Monday evening banquet program at its annual Policy Conference for 1983 through 1989. AIPAC adds that these patrons do not contribute a significant portion of the approximately $200,000 in overall costs for the Policy Conference. For instance, the list for 1989 lists nine corporations at $750 each for a total of $6,750.

AIPAC argues that to the best of its knowledge, "virtually all corporate contributions have been made by corporations owned or controlled by members of AIPAC." Thus, it posits that any corporate dues payments have been "unrelated to any business purpose or objective of the company." It adds that it "does not and would not accept a membership payment contribution or other financial support from a corporation for the purpose of influencing the policies, speech or lobbying agenda of AIPAC." Therefore, it concludes that such payments cannot serve as conduits for the type of direct spending that creates a threat to the political marketplace, citing *MCFL*.

As AIPAC acknowledges, it has accepted corporate checks for dues payments. While it may have a policy of not actively soliciting corporate contributions, it evidently does not have a policy against accepting such donations. Although AIPAC contends the amount of corporate checks it has received as "so

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[41] These calculations were based on dues payments of $500 or more for which AIPAC had copies of the checks. AIPAC notes that it "does not believe there was a significant number of corporate checks for amounts less than $500, but has no records that can confirm this."

small as to be relatively insignificant," the General Counsel does not view the Act has having any *de minimis* exception as AIPAC appears to suggest. Thus, AIPAC does not appear to satisfy the *MCFL* test.

E. Conclusion

Accordingly, based on the analysis set forth in this brief, the General Counsel recommends that the Commission find probable cause to believe AIPAC has violated 2 U.S.C. § 441b(a) and find no probable cause to believe it has violated 2 U.S.C. §§ 433 and 434.

III. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find no probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. §§ 433 and 434.

2. Find probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. § 441b.

1/30/92
Date

/s/ LAWRENCE M. NOBLE
LAWRENCE M. NOBLE
General Counsel

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)
	) MUR 2804
American Israel Public Affairs Committee	)
	)

GENERAL COUNSEL'S REPORT

I. **STATEMENT OF THE CASE**

This matter was initiated by a complaint filed on January 12, 1989, by James E. Akins, George Ball, Richard Curtiss, Paul Findley, Robert J. Hanks, Rear Admiral Andrew I. Killgore (Ret.), and Orin Parker. On December 19, 1989, the Commission found no reason to believe AIPAC violated 2 U.S.C. § 441a(a)(2)(A) on the affiliation allegation. At the same time, the Commission found reason to believe that the American Israel Public Affairs Committee ("AIPAC") violated 2 U.S.C. §§ 433, 434 and 441b based on activities conducted in connection with federal elections. Regarding these alleged violations, the Commission initiated an investigation in which it posed numerous interrogatories and requests for documents to the Respondents and to other witnesses as well as collected and reviewed information filed with the Commission by federal political committees. On October 30, 1990, the Commission found no reason to believe AIPAC violated any provision of the Act on the basis of the amended complaint filed on July 23,

1990.[1] This Office and counsel for AIPAC engaged in several telephone discussions and met in September 1991 for the purpose of discussing whether AIPAC would request preprobable cause conciliation. AIPAC continued to entertain the possibility of making such a request until November 1991 when AIPAC and this Office agreed informally that the better route would be to prepare a probable cause brief.[2]

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[1] In February 1990, Edward Zuckerman and Richard Mayberry (counsel for the complainants) filed separate FOIA requests for portions of the file in this matter relating to respondents who were no longer involved in the matter. Those requests were initially denied by the FOIA office, and the requesters appealed to the Commission. This Office, in a memorandum dated July 18, 1990, recommended that the Commission uphold the FOIA officer's denial. We noted that we were prepared to recommend disclosure of the materials regarding the affiliation issue and would have done so but for the filing of the amended complaint. The Commission decided not to release the materials at that time pending resolution of the amended complaint.

Once the amended complaint was dismissed in October 1990, we submitted another memorandum, dated December 14, 1990, recommending release of the material relating to the affiliation issue. On December 18, 1990, the Commission agreed and the material was released on December 21, 1990. In February 1991, we further recommended that the Commission release tape recordings of the executive session of July 24, 1990, and December 18, 1990, pertaining to the discussion of the FOIA requests. Finally, in a March 15, 1991, memorandum we recommended that portions of the tape recording of the December 19, 1989, meeting (when the Commission made the initial findings in this matter) be released to the American Educational Trust.

[2] On November 4, 1991, the complainants in this matter filed suit against the Commission pursuant to 2 U.S.C. § 437g(a)(8). The district court issued an order that the Commission issue a final decision on the merits of the administrative complaint by 4 p.m. on May 29, 1992. That order is being appealed.

On February 3, 1992, the General Counsel forwarded a probable cause brief to the Respondent addressing all of the outstanding issues in this matter. Respondent's counsel met with staff of this Office to discuss the brief on February 28, 1992, and separately requested an extension of time to file a response, which was granted. Respondent filed its response on April 6, 1992.

II. FACTUAL AND LEGAL ANALYSIS

The General Counsel's Brief, dated February 3, 1992, is incorporated by reference into this report.

AIPAC makes three basic arguments in response to the General Counsel's recommendations. First, AIPAC argues that it is constitutionally impermissible for the Commission to define the parameters of AIPAC's internal governance for purposes of communicating with its members on any subject. Second, AIPAC contends that it meets the requirements for a membership organization under the interpretation the Commission has given to the term "members." Third, AIPAC asserts that it has made no contributions or expenditures in connection with a federal election. Each of these arguments will be separately outlined together with our response to each argument.

A. AIPAC's Constitutional Arguments

AIPAC makes an intricate and complex argument that the interpretation of the Act and its application to AIPAC set forth in the General Counsel's Brief is simply not constitutionally permissible. AIPAC argues:

> [T]here is a clear constitutional difference between the right of the government to restrict the rights of members for purposes of soliciting contributions to a separate segregated fund and restrictions affecting the internal communications among those individuals who regard themselves as members of an incorporated membership organization.

AIPAC finds support for its position in the construction and interpretation of the Act given in three Supreme Court cases: *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) ("*NRWC*"), which dealt with the definition of member for purposes of solicitations to a separate segregated fund; *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 495-96 (1985) ("*NCPAC*"), where the Court noted that *NRWC*'s upholding of restrictions on who may be solicited for contributions to a political committee is of a different constitutional stature than restrictions on expenditures to propagate its views on issues of general public interest; and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 258, 259-60 (1986) ("*MCFL*"), where the Court noted that it has consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.[3] AIPAC

[3] AIPAC contends that the General Counsel seeks to avoid these constitutional distinctions by characterizing its alleged violations as in-kind contributions. It argues that its "routine" meetings with candidates to discuss U.S. - Israel relations and "the outlook of the candidate's campaign" does not mean that any action AIPAC may undertake on behalf of the candidate constitutes the kind of "prearranged and coordinated plans" that the Commission and the Act deem necessary to break the independence of any expenditure AIPAC may wish to make. It

asserts that the only recognized compelling interest permitting any impinging of associational freedom is to prevent the appearance or actuality of corruption, which AIPAC claims does not exist in its case.

Finally, AIPAC claims that the regulations concerning members and membership organizations are unconstitutionally vague because they do not provide a coherent meaning for the term member in the context of partisan communications other than solicitations. AIPAC notes:

> While an ad hoc approach to the definition of member may be permissible in the non-constitutionally protected area of solicitations for a separate segregated fund, due process will not countenance such a piecemeal approach in the highly protected area of internal communications and governance.

AIPAC concludes that "[w]hether judged by the relevant case law, the Commission's own advisory opinions, or the plain wording of the Act and the Commission's regulations, the Commission has no authority to dictate AIPAC's internal governance or otherwise restrain the content of AIPAC's internal communications."

We do not find AIPAC's arguments for special treatment of partisan communications to be convincing.

First, we would point out that the Commission is not dictating to AIPAC how to formulate its internal organization. AIPAC has a choice of how it wishes to be governed internally. The only issue here is what

then argues that even if it has made in-kind contributions, a violation of Section 441b must include facts that show "some express advocacy" in connection with the communication.

impact AIPAC's chosen internal organization has under the Act. Moreover, it is the Commission's responsibility to determine who qualifies as a member under the Act. To accept what AIPAC appears to be arguing, i.e., that the Commission should defer to the organization's own treatment, would in effect reinstate the approach NRWC advocated. Clearly, the Court intended otherwise.

We are also not persuaded by AIPAC's arguments that the Constitution requires a more expansive interpretation of the term "members" for purposes of partisan communications by an incorporated organization than the interpretation given that term for the purposes of soliciting contributions to a separate segregated fund. First, AIPAC does not present a persuasive case that Congress intended the term "member" to mean one thing for partisan communications and another for solicitations to a PAC, especially when the same term is used within the same statutory framework that addresses the same subject matter: political activity undertaken to influence federal elections. In our opinion, AIPAC's reliance on Supreme Court cases involving political party organizations is also misplaced. The Court has recognized a distinction between political committees and organizations, even if incorporated, on the one hand and corporate membership organizations and other corporations, on the other hand. *See, e.g., NCPAC*, 470 U.S. at 495 (distinguishing *NCPAC* and *NRWC*). AIPAC's reliance on Justice O'Connor's concurring opinion in *Roberts v. United States Jaycees*, 468 U.S. 609 (1983) ("*Roberts*"), is likewise misplaced. In *Roberts*, the Court said that state law banning discrimination on the basis of gender could be constitutionally applied to the Jaycees, a membership or-

ganization, because the state law served a compelling interest in eradicating discrimination against women even though the statute infringed on the organization's right to decide its own internal affairs. Justice O'Connor disagreed with the Court's application of the compelling interest test and instead argued that the issue should be viewed as one involving commercial speech and association, which she posited enjoyed substantially less constitutional protection.

Second, to the extent that the Supreme Court has examined this issue, it has given no indication of support for AIPAC's argument. The decision in the *NRWC* case did not suggest that a different interpretation of "members" would apply for communications that did not solicit contributions to a PAC. The Court also did not give any indication it would treat partisan communications by a corporation differently than solicitations when it decided *NCPAC* or when it carved out the special exemption for a limited number of membership organizations in *MCFL*.

Third, we note that in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) ("*Pipefitters*"), the Court said the same rationale that permitted a membership organization to communicate with its members also supported allowing such an organization to solicit them for voluntary contributions to a separate segregated fund. The Court quoted statements during debate on the 1971 Act by Rep. Hansen who, with the Act's exception for internal communication in mind, said:

> every organization should be allowed to take the steps necessary for its growth and survival. . . . If an organization . . . believes that certain candidates pose a threat to its well-being or the

> well-being of its members or stockholders, it should be able to get its views to those members or stockholders.

Id. at 431 n.42. The Court then stated that "[t]his reasoning, of course, applies as well to solicitations for contributions to voluntary political funds." *Id.* This observation by the Court in *Pipefitters* suggests that the term "members" should be given a similar interpretation for partisan communications and for solicitations. Furthermore, in *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America*, 352 U.S. 567 (1957) ("*Automobile Workers*"), the Court stated that the predecessor to Section 441b was intended to prohibit "the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." *Id.* at 589. The Court further noted that whether a communication was made to an organization's membership or to the public at large was, in the first instance, a question of fact. *Id.* at 592.

Fourth, in response to AIPAC's argument on the compelling interest test, we note that the Court has also said that the strictures of Section 441b serve to prevent a different type of corruption than the customarily financial *quid pro quo*. These strictures also serve to prevent the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. *See, e.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) ("Austin"), and *MCFL*, 479

U.S. at 256-58.[4] These concerns also apply to large incorporated membership organizations, such as AIPAC, that have amassed large aggregations of funds. The General Counsel's Brief notes that in 1989 AIPAC had revenues approaching $10 million. Because AIPAC accepts dues payments made on behalf of individual members by for-profit corporations, it could (without the strictures of Section 441b) "serve as a conduit for corporate political spending." *Austin*, 494 U.S. at 664. We would acknowledge, however, that AIPAC's dues probably correlate with support for its political ideas in that those who disagree with AIPAC's positions will quit the organization.

AIPAC also claims that the Commission has recognized a distinction between solicitations for a separate segregated fund and other partisan communications in several advisory opinions, the most recent of

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[4] In *MCFL*, the Court noted:

> We have described that rationale in recent opinions as the need to restrict "the influence of political war chests funneled through the corporate form," *NCPAC*, 470 U.S., at 501; to "eliminate the effect of aggregated wealth on federal elections," *Pipefitters*, 407 U.S., at 416; to curb the political influence of "those who exercise control over large aggregations of capital," *Automobile Workers*, 352 U.S., at 585; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," *National Right to Work Committee, supra*, at 207.
>
> This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.

479 U.S. at 257.

which is Advisory Opinion 1987-29. AIPAC also cites to other advisory opinions where it claims the Commission recognized this distinction, such as Advisory Opinions 1977-67, 1982-2, 1984-23, and 1985-11. Counsel acknowledges that Advisory Opinions 1977-67 and 1982-2 were issued prior to the NRWC decision, but refers to a citation to these opinions in Advisory Opinion 1985-11 as indicating that they still retain precedential value. Since Advisory Opinion 1985-11 addressed the solicitability of a class of persons for contributions to a separate segregated fund, its citation of these two opinions does not support AIPAC's point that the Commission has made a distinction between partisan communications and solicitations. Advisory Opinion 1985-11 was pointing out a distinction between its situation and those presented in the earlier pre-*NRWC* opinions. Such citation should not, necessarily, be interpreted as saying that the Commission would reach the same result on the same facts after *NRWC* as AIPAC appears to claim.[5]

Advisory Opinion 1984-23 also cannot be read as supporting AIPAC's contention. In the consideration of this opinion, the Commission rejected a draft proposal from this Office that would have drawn a distinction between communications that solicit contributions to a PAC and other types of partisan communications. The Commission permitted the publication of a partisan communication in a regularly issued newsletter sent out by the requester because the number of nonmembers who received the newsletter was *de minimis*. It did not permit the publication of the same message in the monthly magazine because

[5] See discussion of Advisory Opinions 1977-67 and 1982-2, *infra*.

its circulation beyond the membership was more than *de minimis*. In reaching this result, the Commission did not base its decision on a different view of membership requirements for purposes of partisan communications that do not solicit a contribution, but was instead taking into account the realities when a partisan message is included in a regular publication of an organization that does have members under the Act. See also, First General Counsel's Report in MUR 3474.

In reference to Advisory Opinion 1987-29, AIPAC finds significance in the fact that the opinion, in reaching a conclusion the requester could make a partisan communications to its members for contributions to candidates, did not analyze the "more restrictive membership criteria that applies to the solicitation of contributions from members for the benefit of the organization's separate segregated fund." The obvious answer to this argument is that the opinion did not engage in this analysis because the Commission has not formulated different membership requirements based on the distinction between solicitations to a PAC and other partisan communications, including those soliciting for contributions to candidates.[6]

In sum, we disagree with AIPAC's argument that the Constitution compels a different definition of membership for partisan communications than for solicitations to an organization's separate segregated

[6] We note that in Advisory Opinion 1984-22, at footnote 3, [which AIPAC cites later in its brief on another issue] the Commission indicated that it would give a similar definition to "members" for partisan communications as it would for solicitations to a separate segregated fund.

fund or that the Commission has recognized such a distinction in its prior rulings.

B. Definition of Members

AIPAC also contends that since the *NRWC* decision the Commission, without benefit of adequate notice and rulemaking proceedings, has transformed the Court's suggestion of a significant financial *or* organizational attachment into a significant financial *and* organizational attachment. It argues that once the General Counsel acknowledges that persons take affirmative steps to join AIPAC and make a significant financial attachment, it defies the common meaning of *NRWC* to assert AIPAC is not a membership organization by claiming that individuals do not have sufficient rights to participate in the governance of AIPAC.

Furthermore, AIPAC contends that individuals do have a right to vote by approving the annual policy statement at the annual meeting, a right AIPAC notes is affirmatively guaranteed in its by-laws, although the law of the District of Columbia for nonprofit corporations vests no voting rights in members unless the organization's corporate documents specifically grant such a right. AIPAC contends that individuals have the opportunity, by vote, to formulate AIPAC's agenda and to structure the focus of its lobbying activities for the coming year by the adoption and ratification of the annual policy statement, the central purpose of the annual meeting, which AIPAC contends occurs in a carefully structured and deliberative process.

It notes that the statement of purpose in its by-laws provides that AIPAC is to maintain and further the friendship between the United States and Israel and

to strengthen and promote mutual ideals and interests in both nations "in accordance with the views of its members." AIPAC has described the annual policy statement as the "guiding document of the organization" that is "routinely consulted by AIPAC officers" and "universally regarding as binding on the policies and direction of the organization." It further notes that the principles in the policy statement are the basis on which individuals "choose to join or leave the organization."

AIPAC further characterizes itself as "the paradigm of a highly motivated grass-roots membership organization." It argues that in addition to the right to vote on the policy statement, AIPAC's organizational framework provides numerous means through which individuals may participate in the governance including many mentioned in the *NRWC* opinion, such as a network of key contacts, state chairs, regional boards, standing committees, and governing boards in which individuals play an integral role. AIPAC points out that individuals have a right to attend meetings of the Executive Committee, the National Council, and all standing and special committees, the right to attend and be heard at the annual policy conference, and the right to circulate and submit petitions for nomination of members to the various committees of AIPAC.

AIPAC adds that its by-laws specifically provide for members and an annual meeting of members and that its pledge forms, receipts and solicitation materials specifically refer to members as well as the right of members to receive special publications and participate in special AIPAC activities including regional political workshops, educational seminars, and community caucuses. AIPAC argues that these addi-

tional rights of its members are far more meaningful than those found sufficient in MUR 1765, involving the NRA, and in MUR 1982-2. It also finds support for its position in Advisory Opinions 1977-67 and 1984-22 as well as MUR 1860. We will first address these opinions and enforcement matters and will then address AIPAC's arguments why individuals who belong to it have sufficient indicia of membership for purposes of the Act.

We note that Advisory Opinion 1977-67 dealt with whether a certain group of persons were members of the Public Service Research Council for purposes of being solicited to the Public Service Political Action Committee. The Commission concluded that persons meeting these criteria would be solicitable because they: (1) made an affirmative step to join the organization evidenced in writing; (2) participated in a yearly membership survey, which the board considers in governing the organization; (3) pay dues at regular intervals in a predetermined amount; and (4) receive a waiver of dues only on the basis of predetermined criteria.

Most importantly, the emphasis in the opinion on the ability to participate in membership surveys as a means to demonstrate a right to participate in the governance of the organization should no longer be viewed as adequate. Even if this opinion is not viewed as superseded on this point, we would be reluctant to give much weight to such surveys given the current plethora of solicitations in the form of surveys being used by a wide variety of organizations. To do so would make it difficult to distinguish a true membership organization from a direct mail operation. In distinguishing this opinion, however, we are not equating AIPAC's policy statement with a membership

survey or suggesting that AIPAC is merely a direct mail operation. We are merely pointing out the inadequacy of the opinion as precedent on the membership issue.

Advisory Opinion 1982-2 dealt with a proposed partisan communication, urging support for the contributions to specific candidates, that the National Radio Broadcasters Association ("NRBA") planned to send to its active and associate members. Active members were entities licensed by the Federal Communications Commission ("FCC") for commercial AM and FM stations. Active members possessed the right to one vote on all appropriate occasions, the right to attend all conventions and membership meetings and to speak at them, and the right to have a representative nominated to the Board of Directors. Associate members included entities licensed by the FCC for noncommercial AM and FM stations as well as other entities engaged in the business of commercial or noncommercial radio broadcasting which were not otherwise eligible for active membership. Associate members had the right to attend and exhibit at conventions, the right to have a representative nominated as a Director-at-Large and serve on the board of directors, and the privilege of having a representative serve on committees.

The opinion concluded that both active and associate members were members who could receive the partisan communication. In reaching that conclusion, the opinion cited Advisory Opinion 1977-67 and noted that it suggested that a sufficient indicia of a membership relationship must exist between an organization and a group of persons for those persons to be considered members under the Act. The opinion noted that both active and associate members of NRBA

have interests and rights in the organization, assume some right to participate in the organization's direction, and have an obligation to help sustain the organization financially.

As noted, this opinion relied heavily on Advisory Opinion 1977-67. Both opinions were issued prior to the *NRWC* decision. In recognizing the emphasis in the *NRWC* decision on whether members of membership organizations have rights analogous to those of stockholders in corporations and members of labor organizations, the Commission has placed considerable emphasis on a person's having a right to vote for the officers or directors of an organization as well as a financial obligation in order for such persons to qualify as members for purposes of the Act. Nevertheless, we do note that associate members of NRBA had the right to have a representative nominated and elected to the board as a Director-at-Large. Moreover, noncommercial stations could only be associate members. Other associate members were limited to those engaged in the business of commercial or noncommercial radio broadcasting. Thus, the associate members had a strong economic reason for joining NRBA that was more paramount than NRBA's political activities. Also, by establishing criteria for membership that restricted the potential membership, active or associate, NRBA did not have the potential of opening the door to membership to "include anyone who has responded to one of the corporation's essentially random mass mailings." *NRWC*, 459 U.S. at 204.

Advisory Opinion 1984-22 dealt with whether various classes of persons associated with the American Stock Exchange ("Exchange") qualified as members for purposes of the Act in order to be solicitable for

contributions to the Exchange's separate segregated fund. The Commission agreed that the options principal class qualified for membership even though they did not possess a right to vote for board members because they had a right to be elected to the board, to serve on the Exchange's standing and disciplinary committees, a regular financial obligation, and floor trading privileges. The Commission could not agree on whether the associate class qualified as members. They had the same rights as options principals, except that they lacked floor trading privileges. Thus, the Commission limited the class of persons qualifying as members to those who had trading privileges on the floor of the Exchange by according some weight to these economic ties to the organization, which also serve to place a limit on the universe of potential members. On its facts, the circumstances addressed in this opinion are clearly distinguishable from AIPAC. Thus, we find little in this opinion to support AIPAC's argument on the membership issue.

In MUR 1765, the Commission addressed whether the persons solicited by the National Rifle Association ("NRA") for contributions to its separate segregated fund were members under the Act. The facts relating to this matter are set out in more detail in the General Counsel's Brief at pages 71-73. The First General Counsel's Report, dated October 15, 1984, concluded that all persons solicited by the NRA were members, relying on Advisory Opinion 1977-67 and *NRWC*. The report noted that all classes of members provided for in the by-laws were required to pay dues in order to be eligible to vote. It further noted that although only annual and lifetime members have a right to vote for the board of directors, which sets the policy and governs the NRA, other members had

rights within the organization, referring to Advisory Opinion 1977-67. These other rights included the right to hold membership on any committee and recommend policies, etc., to the board, the right to attend all meetings of the organization and the board and being heard at official membership meetings, and the right to circulate and submit petitions for nominating directors. With reference to *NRWC*, the report concluded members had additional rights that included a guaranteed annual meeting, the issuance of a membership certificate, and a subscription to the official journal as well as the opportunity to compete in matches and to receive advice and assistance related to armaments. Also, because of the manner in which NRA's board was chosen, the board was not self-perpetuating.

MUR 1860 addressed the question of membership for the Citizens Committee for the Right to Keep and Bear Arms ("CCRKBA"). The facts relating to this matter are also set out in more detail in the General Counsel's Brief at pages 73-77. The Commission concluded in MUR 1860 that the purported "members" of CCRKBA did not have adequate rights to participate in the governance of the organization. The board of directors was self perpetuating, and "members" had no right to elect corporate officers or to control corporate expenditures as well as no right to vote on corporate matters or attend membership meetings. The General Counsel found the use of surveys, polls, questionnaires, and petitions to provide input from the purported "members" was insufficient to demonstrate an adequate right to participate in the governance of the organization.

We remain unpersuaded by AIPAC's arguments, although we do recognize that it is a close question

whether persons who belong to AIPAC qualify as members for purposes of the Act. We acknowledge that it appears any person who belongs to AIPAC may attend and participate in its annual Policy Conference. Besides including speeches and briefings, the Policy Conference is also the event AIPAC uses to have those attending personally lobby Members of Congress on behalf of AIPAC's goals. Attendees also have the opportunity to debate and vote on the Policy Statement, which AIPAC asserts governs the organization for the next year and is regularly consulted by the Executive Committee, Officers, and staff.[7] We acknowledge that the Policy Statement plays a more important role in governing AIPAC that the kind of membership surveys and questionnaires involved in Advisory Opinion 1977-67 and MUR 1860. We also recognize that any "member" who attends the Policy Conference may debate and vote on the Policy Statement.

AIPAC also has an array of regional boards, standing committees, state chairs, and key contacts that offer individuals an opportunity to participate in AIPAC's affairs. Individuals also have the right to attend meetings of the Executive Committee, the National Council, and all standing and special committees. They also may circulate and submit petitions for nomination to any AIPAC office including the Nominating Committee and the Executive Committee. In short, AIPAC offers ample opportunity to those who seek to become more involved in AIPAC's affairs to do so. Through such involvement, AIPAC

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[7] Sample Policy Statements were circulated as attachments to CIR #2, dated August 22, 1991, at pages 6-38.

asserts that individuals often become eligible and nominated for the Executive Committee.

The Executive Committee, however, governs AIPAC and elects its officers. The Executive Committee also elects its own members, though no person can serve more than five consecutive one year terms. Furthermore, while the Executive Committee consists of 250 persons (a sizable number), we note that in 1989 AIPAC indicated it had 37,104 "members." Thus, this number represents less than one-tenth of one percent of the number of claimed "members."

We would further note that while stockholders in a corporation have a right to vote for directors, they do not have a right to set policy for the corporation. That policymaking right resides with the board of directors. Thus, in terms of an analogy to stockholders, persons who belong to AIPAC who attend the Policy Conference and vote on the Policy Statement have a qualitatively different means of participating in the governance of the organization than do stockholders in a corporation. This statement may represent the views of those voting on it for the benefit of the Executive Committee, officers, and staff, but persons who belong to AIPAC do not appear to be able to make it legally enforceable or binding on AIPAC. Nevertheless, AIPAC cannot escape that fact that the membership at large has no right or opportunity to elect persons to the Executive Committee or to elect AIPAC's officers. It is the absence of this right in the membership at large that we find most troublesome. In our view to treat all 37,000+ persons as members of AIPAC for purposes of the Act would indicate that the Commission is no longer using voting rights as a bright line test to establish membership under the Act.

We would, however, acknowledge that the 250 members of the Executive Committee would qualify as members for purposes of the Act since they do possess a right to elect officers and other members of the Executive Committee. Therefore, we conclude that any recognition that AIPAC has members should be limited to those who serve on the Executive Committee.[8]

C. AIPAC's Activities

AIPAC further argues that even if the Commission should find against it on the constitutional and membership issues, it should still find that AIPAC's activities described and questioned in the General Counsel's Brief do not constitute a violation of 2 U.S.C. § 441b. In this regard, AIPAC contends that the Supreme Court and lower federal courts have construed the "in connection with an election" language of 2 U.S.C. § 441b to require express advocacy and argues that the General Counsel is recommending a probable cause finding without evidence of express advocacy. In a footnote, AIPAC further asserts that because Section 441b uses contribution or expenditure interchangeably for the purpose of that section, that the "in connection with" standard enunciated by the courts "is applicable to both terms."

Moreover, AIPAC contends that its contact with federal candidates (which it describes as "brief") that included a discussion of the status of their campaigns does not indicate any cooperation, consultation, or prearrangement between AIPAC and the candidates

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[8] This conclusion does not rule out recognizing a broader category of members if voting rights are extended beyond the Executive Committee.

that would result in AIPAC's activities relating to such candidates being considered coordinated with them. AIPAC argues that there is no evidence that it made any expenditure in cooperation, in consultation, in concert, or at the request or suggestion of any candidate or based on information provided by the candidates with a view toward AIPAC making such expenditures. It cites to statements in affidavits by several campaign fundraisers that state that AIPAC never provided direct assistance to the campaign and "to their knowledge" never provided indirect assistance by "instructing" persons to contribute to specific campaigns. AIPAC claims that if the Commission were to find probable cause based on these circumstances, every fundraising event in Washington, D.C., would be called into question.

AIPAC then reviews specific communications or activities questioned in the General Counsel's Brief and claims that with one exception they did not involve express advocacy and therefore cannot provide a basis for a violation of Section 441b. With regard to the Campaign Updates, AIPAC argues that they are merely issue discussions and analysis and outside the purview of the Act, especially since they do not contain any express advocacy. AIPAC also takes issue with the references in the brief to the affidavits from fundraisers and others that AIPAC staff has put candidate fundraisers and AIPAC supporters in touch with each other and refers to the statements in the affidavits quoted above in the previous paragraph.

With regard to the Morton Friedman instance where AIPAC provided Friedman with a sample solicitation letter, a candidate position paper and a list of Jewish PACs, AIPAC argues that since Friedman at that time was a voting member of AIPAC's Exec-

utive Committee, he would meet even the criteria for membership set out in the General Counsel's Brief. While apparently conceding that the regulations regarding the distribution of a candidate's campaign materials would arguably include a candidate's position paper, AIPAC contends that this regulation was aimed at mass reproduction and distribution, and not the sending of a single issue paper on request. AIPAC further asserts that the Commission should not construe the regulation to preclude an organization from communicating with its board of directors of issues of concern, but that even if that were the case, there was no express advocacy within the position paper itself.

AIPAC appears to concede that the activity described in the Schrayer memorandum may qualify as express advocacy in that it indicates an AIPAC staff person contacted persons who belong to AIPAC who were associated with various Jewish PACs to urge them to contribute to specific federal candidates. AIPAC, however, describes this activity as "rare and isolated instance" that cannot be valued and that could arguably fall within the "safe harbor volunteer exemption" of 11 C.F.R. § 114.9(b). It dismissed the Amouyal memorandum as indicating nothing but issue advocacy, and that the pattern of contributions by Jewish PACs noted in the General Counsel's Brief does not prove that AIPAC's efforts to generate contributions from Jewish PACs to federal candidates occurred more often than the one instance represented by the Schrayer memorandum.

We disagree with AIPAC's attempt to impose an express advocacy standard for judging all of its political activities on behalf of candidates. As noted above, AIPAC acknowledges that it routinely meets

with candidates [because they are candidates] and, in addition to discussing the candidate's views on Middle East issues, also discusses campaign strategy and fundraising needs and goals with the candidate. In our view once AIPAC has held such meetings and discussions with a candidate, any subsequent activity or communication AIPAC undertakes regarding that candidate that goes beyond its "members" under the Act would have to be viewed as activity or communications undertaken in coordination or consultation or in concert with the candidate and the candidate's campaign. AIPAC cannot separate what it knows about a candidate's campaign from what it does on behalf of such a candidate. Because such activity or communication would then constitute an in-kind contribution to the candidate, we do not believe an express advocacy standard is appropriate or required.

In our brief we identified certain communications by AIPAC that we believe present a violation under the Act when they are addressed to persons outside AIPAC's membership as it is defined under the Act or involve activities that are directed to such persons. First is AIPAC's acknowledged role of acting as a contact between its purported members and candidates or their fundraisers by either putting them in touch with each other or suggesting who to contact.[9] While it is difficult to measure the value of such activity, its importance should not be minimized. Whenever AIPAC undertakes such activity, it is clearly indicating a candidate is favored. Second is the collection and distribution of candidate position

[9] The affidavits that are at issue on this point are reproduced at Exhibits 18 and 21 of AIPAC's response to the complaint, dated March 20, 1989.

papers, which is essentially the republication or distribution of campaign material.[10] Although AIPAC attempts to downplay this activity by claiming it is only sending them out one at a time, usually on request, it still remains that AIPAC routinely collects and maintains this information. Commission regulations specifically state that republication of a candidate's campaign materials is a corporate contribution regardless of whether they are sent to members or beyond. 11 C.F.R. § 114.3(c)(1).

Third is the preparation and distribution of the yearly "campaign update" that covers the voting record and position of incumbents and rates their election prospects and fundraising status to the extent that the updates reflect what AIPAC has learned about the campaigns from its meetings with candidates.[11] It is clearly written to indicate who should or should not be supported and where contributions would do the most good from AIPAC's standpoint. Fourth is AIPAC's efforts to contact purported members who are also associated with one of the Jewish PACs to urge financial support for specific candidates. AIPAC also seeks to downplay this activity by acknowledging it only for those instances that have come to light and treating them as isolated and not particularly successful. In our view it is only necessary to establish the fact AIPAC did make such contacts to show a violation. How frequent or how successful such contacts may have been goes more to

[10] Sample candidate position papers were circulated as attachments to CIR #2, dated August 22, 1991, at pages 111-119.

[11] Excerpts from the campaign updates dated May 1987 and May 1988 are at Exhibit 25 of AIPAC's response to the complaint, dated March 20, 1989.

the severity of the violation. Because the investigation in this matter has focused on whether AIPAC has acted in conformity with the Act covering a wide range of activities, we recognized that we had limited resources to probe all of AIPAC's specific activities.

Since we acknowledge that the persons making up the Executive Committee would qualify as members under the Act, we would agree that AIPAC may communicate to this group of persons on any subject. This conclusion would also cover AIPAC's providing Morton Friedman with a sample solicitation letter and other information since AIPAC maintains he was a member of the Executive Committee at that time. We would also acknowledge that some [but not all] of the persons to whom AIPAC made the partisan communications described above were probably members of the Executive Committee at the time of AIPAC's communications. Nevertheless, there is no evidence that AIPAC sought to limit such communications to members of the Executive Committee, and AIPAC has made no such claim, except in the case of Friedman. As noted, many of the persons associated with Jewish PACs also have belonged to the Executive Committee. But the make-up of the Executive Committee was constantly changing, so that at any one time a substantial number of the persons associated with Jewish PACs who may have received partisan communications were not members of the Executive Committee. Therefore, we conclude that these questioned communications went to persons outside the defined group of members.

Accordingly, we recommend that the Commission find probable cause to believe AIPAC violated 2 U.S.C. § 441b. For the reasons stated in the brief, we also recommend that the Commission find no probable

cause to believe AIPAC violated 2 U.S.C. §§ 433 and 434.

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

IV. RECOMMENDATIONS

1. Find no probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. §§ 433 and 4343.
2. Find probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. § 441b.
3. Approve the attached conciliation agreement
4. Approve the appropriate letter.

5 29 92 — /s/ LAWRENCE M. NOBLE
Date — LAWRENCE M. NOBLE
General Counsel

Attachment
Conciliation Agreement

Supreme Court, U.S.
FILED
AUG 21 1997

No. 96-1590

In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether respondents had standing to challenge the Federal Election Commission's decision not to bring an enforcement action in this case.

2. Whether an organization that spends more than $1,000 on contributions or coordinated expenditures in a calendar year, but is neither controlled by a candidate nor has its major purpose the nomination or election of candidates, is a "political committee" within the meaning of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-40a) is reported at 101 F.3d 731. The opinion of the court of appeals panel (Pet. App. 41a-74a) is reported at 66 F.3d 348. The opinion of the district court (Pet. App. 77a-93a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 6, 1996. On February 21, 1997, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 7,

1997. The petition for a writ of certiorari was filed on April 7, 1997, and was granted on June 16, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 301(4)(A) of the Federal Election Campaign Act of 1971 (FECA or Act) defines the term "political committee" to include

> any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.

2 U.S.C. 431(4)(A).

STATEMENT

1. This case involves provisions of the Federal Election Campaign Act of 1971 (FECA or Act) governing the activities of a "political committee," defined by the Act to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."

2 U.S.C. 431(4)(A).[1] The FECA requires political committees to satisfy certain organizational requirements. 2 U.S.C. 432. The Act also requires a political committee to register with the Federal Election

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[1] Section 301(8)(A) of the FECA defines "contribution" to include

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. 431(8)(A).

Section 301(9)(A) of the Act defines the term "expenditure" to include

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. 431(9)(A).

The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or the candidate's agents—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

Commission (FEC or Commission). 2 U.S.C. 433. A political committee is required to make comprehensive public disclosures of all of its receipts and disbursements, even those that bear no direct relation to electoral campaigns. See, *e.g.*, 2 U.S.C. 434(b)(3)(G), 434(b)(6)(B)(v); Pet. App. 3a ("Once designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200."). The FECA provides in addition that no person may make contributions to a political committee which, in the aggregate, exceed $5,000 in a calendar year. 2 U.S.C. 441a(a)(1)(C); see *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 253-254 (1986) (*MCFL*) (plurality opinion) (describing requirements applicable to political committees).

Election-related expenditures made by individuals, and by groups that are not political committees, are subject to extensive disclosure requirements. All "persons" (a term that includes any "organization or group of persons," 2 U.S.C. 431(11)) that make independent election expenditures (see 2 U.S.C. 431(17); note 1, *supra*) aggregating more than $250 and are not political committees are required to file disclosure reports with the Commission. 2 U.S.C. 434(c); *MCFL*, 479 U.S. at 252-253 (plurality opinion). In addition, any contributions (including coordinated expenditures) aggregating more than $200 from "persons" to candidates or political committees must be reported by the recipient. 2 U.S.C. 434(b)(3). With respect to reporting requirements, the distinctive consequence of "political committee" status is that such an organization is required to make comprehensive disclosures of *all* of its receipts and

disbursements, whether or not they bear any direct relation to electoral campaigns.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed a broad array of issues concerning the construction and constitutionality of the Act. The Court observed:

> The general requirement that "political committees" and candidates disclose their expenditures could raise * * * vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79 (footnotes omitted).

The Court reaffirmed the "major purpose" test for status as a political committee in *MCFL*. A plurality noted that "this Court said [in *Buckley*] that an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 479 U.S. at 252 n.6. And the Court observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be re-

garded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262.

2. The FEC is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d (a) and (e), 437f, 437g. Congress has authorized the Commission to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1), 437d(e); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h. Congress has thus "vest[ed] in [the FEC] primary and substantial responsibility for administering and enforcing the Act." *Buckley*, 424 U.S. at 109.

The FECA states that "[a]ny person who believes a violation of this Act * * * has occurred, may file a complaint with the Commission." 2 U.S.C. 437g(a)(1). The Act further provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. 437g(a)(8)(A). In such a proceeding, the reviewing court

> may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

2 U.S.C. 437g(a)(8)(C).

3. The American Israel Public Affairs Committee (AIPAC) is an incorporated, tax-exempt organization with approximately 50,000 supporters and a budget of approximately $10 million. Its stated purpose is to maintain and improve friendship and goodwill between the United States and Israel. The organization's activities include lobbying Congress and the Executive Branch for military and economic aid to Israel. Pet. App. 2a-3a. For example, AIPAC's 1989 Policy Statement listed eleven goals for that year, including items such as "promote peace between Israel and its Arab neighbors," and "oppose the sale of sophisticated U.S. arms to Arab countries in a declared state of war with Israel"; none of the 1989 goals mentioned elections or candidates. J.A. 137-138. AIPAC grew out of the work of the American Zionist Council, which in 1954 created a separate full-time lobbying entity called the American Zionist Committee for Public Affairs—renamed AIPAC in 1959. J.A. 120.

Respondents are former ambassadors, Members of Congress, or other government officials. In 1989 they filed an administrative complaint with the Commission, alleging that AIPAC had violated the FECA. Respondents alleged that AIPAC had made campaign contributions and expenditures on behalf of candidates for federal office, in violation of 2 U.S.C. 441b, which prohibits corporations from making such contributions and expenditures except through the establishment of a "separate segregated fund" pursuant to 2 U.S.C. 441b(b)(2)(C). Respondents also alleged that

AIPAC's activities brought it within the statutory definition of "political committee," and that it had failed to comply with the FECA requirements to which political committees are subject. See Pet. App. 3a-4a.[2]

The FEC's General Counsel investigated the allegations. The General Counsel issued a report concluding that

> AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and do[] not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

J.A. 146; see J.A. 37-38 ("AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization."); Pet. App. 43a. The General Counsel therefore recommended that the Commission find no probable cause to believe that

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[2] Respondents

> claimed that AIPAC met the statutory definition of political committee because, for example, it used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meetings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates.

Pet. App. 3a-4a.

AIPAC had violated 2 U.S.C. 433 and 434, the organizational and reporting requirements applicable to political committees. J.A. 152, 179. The General Counsel recommended, however, that the Commission find probable cause to believe that AIPAC had violated 2 U.S.C. 441b. J.A. 152, 179.[3]

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[3] The General Counsel concluded that "AIPAC ha[d] made, in cooperation, consultation, or coordination with federal candidates, communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns." J.A. 37. The General Counsel also concluded that AIPAC had made coordinated expenditures, in violation of 2 U.S.C. 441b, by acting as a contact between its supporters and various candidates or their fundraisers. See J.A. 106-109.

The Court in *MCFL* recognized a narrow, constitutionally based exception to Section 441b's ban on corporate campaign expenditures. The Court noted that MCFL (1) "was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 264. Because those features "essential to [the Court's] holding" obviated the concerns underlying Section 441b, the Court concluded that corporations with those three features "may not constitutionally be bound by § 441b's restriction on independent spending." *Id.* at 263-264. Compare *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 662 (1990) ("Because the Chamber does not share these crucial features, the Constitution does not require that it be exempted" from a comparable state ban on corporate campaign expenditures).

In the instant case, the FEC's General Counsel concluded that AIPAC does not fall within the *MCFL* exception to Section 441b because AIPAC has accepted contributions from business corporations. J.A. 150-152. In any event, the *MCFL* exception applies only to independent expenditures. See 479

Consistent with the recommendation of the General Counsel, the Commission unanimously found no probable cause to believe that AIPAC had violated Sections 433 and 434. Pet. App. 95a.[4] The Commission found probable cause to believe that AIPAC had violated Section 441b. *Ibid.* The FEC voted, however, to take no action regarding that determination, *ibid*, explaining that "the Commission should clarify its membership definition before imposing penalties in close cases such as this," *id.* at 98a.[5]

U.S. at 259-260, 263. AIPAC would therefore be prohibited from making direct or in-kind contributions (except through a separate segregated fund) even if it satisfied the criteria set forth in *MCFL*.

[4] Absent some affirmative contrary indication, the General Counsel's report is presumed to set forth the Commission's rationale for action consistent with the General Counsel's recommendation. See, *e.g.*, *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 38 & n.19 (1981); *National Rifle Ass'n* v. *FEC*, 854 F.2d 1330, 1337 n.7 (D.C. Cir. 1988); *Carter/Mondale Presidential Committee, Inc.* v. *FEC*, 775 F.2d 1182, 1186-1187 & n.2 (D.C. Cir. 1985).

[5] AIPAC contended that the alleged contributions in this case involved communications to AIPAC's own members and were therefore exempt from Section 441b's prohibition on corporate campaign contributions and expenditures. The FECA's definition of "expenditure" generally excludes "any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel." 2 U.S.C. 431(9)(B)(iii); see also 11 C.F.R. 100.8(b)(4), 114.3(a)(2). Consistent with the General Counsel's recommendation, a majority of the Commission concluded that "AIPAC did not meet the Commission's membership criteria," and therefore found probable cause to believe that AIPAC had violated Section 441b. Pet. App. 98a. The Commission also concluded, however, that the case "presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this, where the

4. Respondents filed suit in federal district court. They challenged the FEC's determination that there was no probable cause to believe that AIPAC was a "political committee" within the meaning of the Act; they did not contest the Commission's decision to take no action with respect to AIPAC's alleged violation of Section 441b. See J.A. 9-26. Respondents alleged that they "are politically active persons who * * * oppose AIPAC views on U.S. foreign policy in the Middle East." J.A. 11. Respondents further alleged that they "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public," and that the Commission's dismissal of their administrative complaint "has given AIPAC an illegal advantage in this competition." *Ibid.*

The district court granted summary judgment for the Commission. The court concluded that "the Commission interpreted properly the statutory definition of 'political committee' and the 'major purpose' test." Pet. App. 92a. The court also determined that "the Commission's application of the major purpose test to the facts presented * * * regarding AIPAC's campaign-related activities was reasonable." *Ibid.*

5. A divided panel of the court of appeals affirmed. Pet. App. 41a-74a. The panel first held that respondents had standing to bring their suit. Relying on circuit precedent, the panel held that respondents' asserted "informational injur[y]"—*i.e.*, respondents'

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organization came close to meeting the 'spirit' of the Commission's membership criteria, but failed on a specific point." *Ibid.* The Commission therefore "decided to exercise [its] prosecutorial discretion, * * * and to take no further action with respect to the finding on Section 441b." *Ibid.*

contention that "their ability to influence and inform policymakers and the public is impaired by the lack of information about AIPAC's contributors and expenditures," *id.* at 45a—was sufficient to meet the requirements of Article III. *Id.* at 45a-46a. The court also concluded that, "[b]ecause [respondents] allege that they are voters and persons who seek to communicate to policymakers and the public about AIPAC's campaign contributions, their interest in information about campaign contributions falls within the 'zone of interests' intended to be served by the statute." *Id.* at 47a.

On the merits, the panel concluded that this Court's decisions in *Buckley* and *MCFL* furnished a reasonable basis for the Commission's application of the "major purpose" test. The panel explained:

> Although *Buckley* and [*MCFL*] concern expenditures under the Act, the Court's rationale concerning the constitutional implications of a broad application of the Act to expenditures applies equally to the Act's reach over contributions. A broader construction of "political committee" would likely require advocacy groups to disclose their contributors even though the group is not principally involved in advancing the election or defeat of a candidate. This could raise a First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). It is our duty in the interpretation of a federal statute to avoid serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47 (1953).

Pet. App. 55a-56a (parallel citations omitted). The panel concluded that "[b]ecause a judicial gloss on the statute has limited the application of FECA's restrictions for political committees to groups whose major purpose is the nomination or election of a candidate, the FEC's interpretation of the major purpose test was not contrary to law." *Id.* at 56a.[6]

Judge Silberman filed an opinion concurring in part and dissenting in part. Pet. App. 58a-74a. Relying on respondents' "assert[ion] that they compete with AIPAC in lobbying Congress and seeking to persuade the American people on their views of American interests regarding Arab-Israeli disputes," Judge Silberman viewed the suit as "akin to one brought by an economic competitor" and concluded that respondents satisfied the requirements of Article III. *Id.* at 58a-59a. On the merits, Judge Silberman acknowledged that "there is language in *Buckley* and *MCFL* that can literally be read to support the FEC's position." *Id.* at 68a. He concluded, however, that the "major purpose" test could not properly be applied to an organization that had made *contributions* (as opposed to independent expenditures) in excess of Section 431(4)(A)'s $1,000 limit. *Id.* at 73a. Judge Silberman asserted that any such organization would be subject to the statutory requirements applicable to political committees, without regard to the organization's major purpose. *Ibid.*

6. The court of appeals vacated the panel decision and granted rehearing en banc. Pet. App. 75a-76a. The en banc court of appeals subsequently reversed the judgment of the district court. *Id.* at 1a-40a.

a. The court of appeals first concluded that respondents had standing as voters because "[t]hey have

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[6] The panel also upheld, as reasonable, the Commission's determination that campaign-related activities were not a major purpose of AIPAC. Pet. App. 57a-58a.

been deprived of certain specific information that Congress thought voters needed to make an informed choice and therefore required 'political committees,' *inter alia*, to disclose." Pet. App. 8a. The court explained that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time bids are due, would suffer a particularized injury even if all other bidders also suffered an injury." *Id.* at 12a. Because it concluded that respondents "have standing as affected voters," it declined to "resolve whether [respondents] also have standing as political competitors of AIPAC, or whether [respondent] Findley—who was last a candidate in 1982—has standing as a candidate." *Id.* at 13a (citation omitted).

The court also rejected the FEC's argument that respondents' claim was not redressable because the Commission possesses enforcement discretion and might decline to compel disclosure by AIPAC. The court explained that "it has always been an acceptable feature of judicial review of agency action that a petitioner's 'injury' is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning." Pet. App. 15a. The court of appeals also noted that respondents would be authorized by the FECA to bring suit against AIPAC if the Commission failed to "conform" to the court's "declaration." *Ibid.* (quoting 2 U.S.C. 437g(a)(8)(C)). The court stated that "[i]t would appear under [Section 437g(a)(8)(C)] that if the Commission gave only lip service to compliance with [the court's] order and settled with AIPAC without requiring disclosure,

* * * [respondents] would be able to seek disclosure directly." *Ibid.*

b. On the merits, the court of appeals concluded that AIPAC was a "political committee" within the meaning of the FECA. The court rejected the Commission's argument that the FEC's contrary conclusion was entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Because the controversy involved the proper construction of this Court's opinions in *Buckley* and *MCFL*, the court concluded, deference was inappropriate. Pet. App. 19a-20a.

Addressing the interpretive issue "*de novo*," the court of appeals framed the "key question" as "whether the Supreme Court's major purpose limitation imposed in certain circumstances for constitutional reasons applies in another circumstance—this case—in which the same constitutional concerns may not be implicated." Pet. App. 20a. The court acknowledged that "language in *Buckley* and *MCFL* can literally be read to support the FEC's position." *Id.* at 21a. The court reasoned, however, that "both cases focused on the constitutional concerns raised by independent expenditures * * * as distinguished from coordinated expenditures or direct contributions." *Ibid.* The court noted that "[i]ndependent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption." *Ibid.* It concluded that the *Buckley* Court "clearly distinguished independent expenditures and contributions as to their constitutional significance, and its references to a 'major purpose' test seem to implicate only the former." *Id.*

at 24a. The court of appeals read the *MCFL* opinion in a similar fashion. *Id.* at 24a-25a.

The court of appeals also suggested an alternative basis for its conclusion that AIPAC was a political committee. Respondents "argue[d] that the major purpose test is properly employed to determine whether an organization's independent disbursements constitute 'expenditures' within the meaning of § 431(9)(A)(i), such that they count toward the $1,000 limit defining political committee status." Pet. App. 26a n.11. On respondents' view of the statute, any organization making expenditures (defined as disbursements whose major purpose is to influence federal elections) aggregating more than $1,000 per year is a political committee, regardless of the major purpose of the organization as a whole. The court of appeals, while declining "to determine finally whether [respondents'] version of the test is the only possible one," *ibid.*, construed prior case law to support that approach. See *id.* at 26a (D.C. Circuit precedent "indicates that, as [respondents] contend, it is the purpose of the organization's disbursements, not of the organization itself, that is relevant").

The court of appeals also believed that the Commission's approach would have untoward practical consequences. Thus, the court stated:

> The FEC's interpretation of "political committee" would * * * allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not.

Pet. App. 27a. In the court's view, that approach "would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of 'political committee.'" *Ibid.*

The court concluded:

> There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made campaign contributions in excess of $1,000. Its decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of [respondents'] complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the complaint and remand to the FEC for further action not inconsistent with this opinion.

Pet. App. 29a.

c. Judge Sentelle, joined by Judge Henderson, dissented. Pet. App. 30a-40a. The dissenting judges concluded that respondents asserted only a "generalized grievance"—"a diffuse rather than a particularized injury"—and therefore lacked standing under Article III. *Id.* at 32a-33a. They explained that respondents "have no statutory right, through section 437g or any other provision, to force the FEC to collect and turn over this information. In the absence of such a right, no injury—informational or otherwise—is possible." *Id.* at 38a. The dissenting judges also concluded that

any injury respondents might have suffered was not redressable by a judicial order. They explained that respondents' "claim of redressability depends on the linked chain that the Commission will enter an order against AIPAC requiring the information [respondents] seek, that AIPAC will comply with that order, and that [respondents] will still be sufficiently interested in the information thus produced that they will renew their claim on FEC to present them with that information." *Id.* at 40a. In the view of the dissenting judges, that chain of inferences was "too attenuated to provide the sort of redressability necessary to meet Article III standing." *Ibid.*

SUMMARY OF ARGUMENT

1. A. Respondents' complaint alleged that they oppose AIPAC's views concerning U.S. foreign policy, and that the Commission's decision not to undertake an enforcement action has given AIPAC an unlawful advantage in a "competition" to influence public and governmental opinion. That allegation is insufficient to establish that respondents possess the requisite *personal* stake in the litigation. In any event, respondents' alleged competitive injury does not fall within the zone of interests protected by the FECA generally or the Act's political committee provisions in particular.

B. Respondents' alternative interest as voters is insufficiently particularized to provide a basis for their suit. The theory articulated by the court of appeals—that respondents have standing because they vote in elections in which AIPAC may have made contributions—would apply equally to all registered voters in the United States. Respondents' alleged injury is a "generalized grievance" rather than the

particularized harm required to establish standing under Article III. Even if that injury were sufficient to satisfy constitutional requirements, moreover, this suit should not go forward. In light of the background rule that the government's decision not to take an enforcement action against a third party is ordinarily not reviewable at all, Section 437g(a)(8)(A) should not be construed so broadly as to encompass a "grievance" that is shared by the entire electorate.

C. Respondents' asserted injuries are not likely to be redressed by a favorable judicial ruling. The Commission is not required to institute an enforcement action in every case in which it believes a violation has occurred. AIPAC consistently has argued that it is not a political committee even under respondents' proposed construction of the Act, and its view might prevail in court should an enforcement action go forward. It is also quite possible that a court would impose, or the Commission would negotiate, a remedy that did not include the disclosures sought by respondents.

2. A. The Commission did not act in a manner "contrary to law" in finding no probable cause to believe that AIPAC had violated 2 U.S.C. 433 and 434. Under this Court's precedents, the FECA's political committee provisions apply only to organizations that are controlled by a candidate or whose major purpose is campaign-related activity. The Court first announced that construction of the Act in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), and reaffirmed that approach in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*).

B. Consistent with this Court's decisions in *Buckley* and *MCFL*, the FEC determined that campaign-related activity was not AIPAC's major purpose and

that the organization therefore was not a political committee. The court of appeals overturned that finding, suggesting two alternative bases for its conclusion that AIPAC should be treated as a political committee. Neither of those theories is consistent with this Court's precedents.

i. The court of appeals suggested that the "major purpose" test might appropriately be used to determine whether a particular disbursement is an "expenditure" counting towards the $1,000 statutory threshold. On that theory, an organization that makes campaign expenditures (defined as disbursements whose major purpose is to influence federal elections) aggregating more than $1,000 per year is, *ipso facto*, a political committee, regardless of the major purpose of the organization as a whole. As articulated in *Buckley* and *MCFL*, however, the "major purpose" test focuses unambiguously on the purpose of the organization, not on the purpose of a particular disbursement. That is particularly clear from *MCFL*, which held that an organization making nearly $10,000 in campaign-related expenditures was not a political committee because its central organizational purpose was issue advocacy.

ii. The court of appeals also concluded that the practical and constitutional concerns underlying the "major purpose" test are implicated only when the disbursements that exceed the statutory threshold are independent expenditures, and are inapplicable to an organization that makes more than $1,000 per year in direct contributions or coordinated expenditures. That conclusion was incorrect. With respect to reporting requirements, the distinctive consequence of political committee status is that an organization is required to disclose all of its receipts and disbursements, even those that have no direct relation to electoral activity. The limiting construction given to the statutory term "political committee" in *Buckley* serves to address the danger that small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose non-campaign-related receipts and disbursements, including receipts and disbursements used for issue advocacy. That danger is equally present whether the triggering disbursements are independent expenditures or direct contributions.

C. Thus, the "major purpose" test responds to the concern that the FECA's disclosure requirements might unnecessarily burden the non-campaign-related speech of an organization that only occasionally makes election expenditures. Contrary to the court of appeals' conclusion, application of the "political committee" provisions to groups that only occasionally engage in campaign activity is unnecessary to ensure that significant contributions and independent expenditures are exposed to public view. AIPAC's campaign-related activity will be subject to reporting requirements even if it is not a political committee. To require groups that are minimally involved in campaign-related activity to report *all* of their receipts and disbursements is unnecessary to effectuate the purposes of the Act.

ARGUMENT

I. RESPONDENTS LACK STANDING TO BRING THIS SUIT

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately re-

solved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, 117 S. Ct. 1154, 1161 (1997). See also, *e.g.*, *Raines* v. *Byrd*, 117 S. Ct. 2312, 2317-2318 (1997); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). As we explain below, respondents cannot meet those requirements.

Even if a plaintiff satisfies the requirements of Article III, moreover, it does not follow that his suit can go forward. "Congress legislates against the background of [this Court's] prudential standing doctrine, which applies unless it is expressly negated." *Bennett*, 117 S. Ct. at 1162. In the instant case, respondents' suit rests on 2 U.S.C. 437g(a)(8)(A), which provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

For two reasons, Section 437(g)(a)(8)(A) should be given a narrow construction.

First, Section 437g(a)(8)(A) applies in an area—the decision by a government agency not to undertake an enforcement action against a private party—that is typically not subject to judicial review at all. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985); *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 616-619 (1973). Second, the statutory review provision under which respondents' action was brought is narrower than that in the Administrative Procedure Act (APA), which authorizes suits by persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. The FECA does not authorize suits by persons "adversely affected," but only by persons "aggrieved" by the FEC's dismissal of a complaint that they have filed with the Commission. 2 U.S.C. 437g(a)(8)(A); cf. *Liquid Carbonic Indus. Corp.* v. *FERC*, 29 F.3d 697, 702 (D.C. Cir. 1994) (Federal Power Act provision authorizing judicial review for "[a]ny party * * * aggrieved" is narrower than APA's judicial review provision).[7]

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[7] This Court's "decisions interpreting the Freedom of Information Act [FOIA] have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 449 (1989). Contrary to respondents' contention (see Br. in Opp. 15), however, their suit is not properly analogized to one brought under the FOIA.

First, the gravamen of an FOIA action is that a government agency has breached its legal duty to disclose to the plaintiff

A. Respondents' Asserted Injury As "Comptitors" Of AIPAC Does Not Satisfy Article III And Is Not Within The Zone Of Interests Protected By The FECA

In their complaint, respondents broadly alleged that they "are politically active persons who * * * oppose AIPAC views on U.S. foreign policy in the Middle East"; that they "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public"; and

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information actually in the government's possession. Respondents, by contrast, challenge the Commission's failure to acquire, through means of an enforcement action, information in the possession of a private party. Cf. *Defenders of Wildlife*, 504 U.S. at 562 ("when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish") (internal quotation marks omitted).

A successful FOIA action, moreover, culminates in a judicial order requiring the government to disclose the information to the plaintiff. See 5 U.S.C. 552(a)(4)(B) (district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"). Respondents' suit, by contrast, could result at most in a "declar[ation] that the dismissal of [their] complaint * * * is contrary to law," and an order "direct[ing] the Commission to conform with such declaration within 30 days." 2 U.S.C. 437g(a)(8)(C). Any order directing AIPAC to disclose its receipts and disbursements could be entered only in a separate lawsuit. See *FEC* v. *National Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). And even if AIPAC were ultimately compelled to make such disclosures, the information would not be provided to respondents directly, but would be made available on equal terms to all members of the public. Cf. *Defenders of Wildlife*, 504 U.S. at 574 (plaintiff lacks standing where the requested relief "no more directly and tangibly benefits him than it does the public at large").

that the FEC's dismissal of their administrative complaint "has given AIPAC an illegal advantage in this competition." J.A. 11. Respondents' purported competitive disadvantage does not constitute Article III injury in fact, and it does not fall within the zone of interests protected by the FECA.

1. In order to satisfy the requirements of Article III, "a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute." *Raines*, 117 S. Ct. at 2317. Respondents do not allege that they have suffered pecuniary or other *personal* injury as a result of their diminished ability to influence governmental or public opinion. Rather, they allege a "diminution in their political voices—their influence in federal elections." J.A. 12. But just as "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court," *Allen* v. *Wright*, 468 U.S. 737, 754 (1984), the government's adoption (or the public's support) of policies with which respondents disagree is not enough, in and of itself, to cause them injury in fact. Cf. *Raines* v. *Byrd*, 117 S. Ct. at 2318 (Members of Congress lacked standing to sue where their "claim of standing [wa]s based on a loss of political power, not loss of any private right").[8]

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[8] Respondents have offered no basis, moreover, for concluding that AIPAC's compliance with the requirements of Sections 433 and 434 would make an "appreciable difference," *Allen* v. *Wright*, 468 U.S. at 758, in their ability to effect changes in U.S. foreign policy. Any such impact would depend entirely upon the subjective reactions of Members of Congress and of the public to the information disclosed. Because "a federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury

2. Respondents' alleged competitive injury does not fall within the zone of interests protected by the FECA generally or the Act's political committee provisions in particular.[9] Because respondents do not allege that they engage in any campaign activity—let alone that they make such efforts in support of candidates that AIPAC opposes—there is no "competition" between AIPAC and respondents in the sphere regulated by the Act.[10] The FECA's disclosure provisions

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that results from the independent action of some third party not before the court," *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 41-42, respondents' claims would not be cognizable in federal court even if their alleged competitive disadvantage were held to constitute injury in fact.

[9] The zone-of-interests test was devised as "a gloss on the meaning of [5 U.S.C.] § 702," the judicial review provision of the APA. *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 395 (1987). This Court has applied the zone-of-interests test outside the context of APA review, while "ma[king] clear * * * that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes." *Bennett*, 117 S. Ct. at 1161 (internal quotation marks omitted). As we explain above, see page 23, *supra*, the statutory review provision under which respondents' action was brought is narrower than that in the APA: it does not authorize suits by persons "adversely affected," but only by persons "aggrieved" by the FEC's dismissal of a complaint that they have filed with the Commission.

[10] The court of appeals suggested that the Commission had conceded respondent Findley's standing as a candidate. See Pet. App. 6a & n.2. That is incorrect. Respondents did not allege that Findley had standing as a candidate or intended to run for office in the future, although they did allege that Findley was a former member of the House of Representatives. See J.A. 14. The FEC's brief to the en banc court noted the

were enacted for the purposes of educating the electorate, deterring corruption in federal elections, and detecting violations of contribution limits, see *Buckley* v. *Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam), not to aid lobbyists in gaining influence in the legislature. Compare *International Ass'n of Machinists & Aerospace Workers* v. *FEC*, 678 F.2d 1092, 1098 (D.C. Cir.) (en banc), aff'd mem., 459 U.S. 983 (1982) (under provision of the Act designed to balance electoral fundraising between labor and corporate interests, union members had standing because of alleged diminution in their unions' influence in federal *elections*).

Thus, while respondents' allegation that they "are politically active persons who * * * oppose AIPAC views on U.S. foreign policy" (J.A. 11) may differentiate them from the public at large, their asserted interest is not one that the FECA's disclosure provisions were intended to serve. Indeed, a wide range of potential plaintiffs—*e.g.*, purveyors of books or magazines focusing on the Middle East—might have a "particularized" interest in obtaining a list of AIPAC's members or donors. Such persons would not, however, be "aggrieved" by the Commission's failure to undertake an FECA enforcement action aimed at compelling disclosure of AIPAC's receipts and disbursements, because their interest in obtaining that information would not be one that the FECA was intended to protect. Respondents' suit is similarly flawed.

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absence of any allegation that respondents were candidates. FEC C.A. In Banc Br. 22.

B. Respondents' Interest As Voters Is Insufficiently Particularized To Provide A Basis For Suit

The court of appeals concluded that respondents had standing as voters, reasoning that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself." Pet. App. 12a. The court acknowledged that respondents "would not be injured as voters if AIPAC's activities were unrelated to any election in which they voted." *Ibid.* It concluded, however, that the absence of proof on that point was not fatal to respondents' claim, explaining that whether "AIPAC made contributions in the elections in which they voted * * * is precisely the information of which [respondents] claim they have been deprived." *Id.* at 12a-13a; see also *id.* at 13a ("there is nothing to indicate that [respondents] did not vote in various federal elections in which AIPAC allegedly made contributions that qualified it as a political committee").

1. The court of appeals' analysis does not support its finding of a "particularized injury." The theory of standing articulated by the court of appeals—that respondents vote in elections in which AIPAC *may have made* contributions—would apply equally to all registered voters in the United States. That asserted injury is insufficiently concrete and personal to satisfy the requirements of Article III. Rather, the "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). "[T]hat harm alone normally does not warrant exercise of jurisdiction." *Ibid.*; see *Allen* v. *Wright*, 468 U.S. at 755-756.

2. Even if respondents' alleged injuries as voters satisfied constitutional requirements, this suit should not go forward. In light of the background rule that the government's decision not to take an enforcement action against a third party is ordinarily not reviewable at all (see page 23, *supra*), Section 437g(a)(8)(A) should not be construed so broadly as to encompass a "grievance" that is shared by the entire electorate. This Court should not lightly conclude that Congress intended to include persons such as respondents as parties "aggrieved" by the Commission's dismissal of a complaint seeking to require it to bring an enforcement action against a private organization with respect to disclosure of all its receipts and disbursements.

C. Respondents' Asserted Injuries Are Not Likely To Be Redressed By A Favorable Judicial Ruling

Even if this Court were to adopt respondents' proposed construction of the Act's political committee provisions, it is far from clear that respondents would ultimately acquire the information they seek. The Commission is not required to institute a civil enforcement action in every instance in which it concludes that a violation has occurred. AIPAC has consistently argued that it is not a political committee even under respondents' proposed construction of the Act, see note 5, *supra*, and it is possible that its view would prevail in court should an enforcement action go forward. Moreover, there is no guarantee that any remedy imposed by a court, or negotiated by the Commission as part of a conciliation agreement, see 2 U.S.C. 437g(a)(4)(A)(i), would result in the disclosures respondents seek. The parties have little or no idea whether AIPAC has retained the information

sought by respondents; a monetary penalty might be deemed a sufficient remedy to forgo enforcement litigation; and the Act does not provide for judicial review of conciliation agreements. Compare 2 U.S.C. 437g(a)(5) with 2 U.S.C. 437g(a)(8)(A).

The circumstances described above—*i.e.*, the Commission's authority to exercise prosecutorial discretion; the existence of possible alternative defenses to an enforcement action; and the availability of alternative remedies if a violation is found—will be present to some degree in most suits brought under Section 437g(a)(8)(A). The circumstances of this case, however, make it particularly speculative that a ruling by this Court in respondents' favor will ultimately give them access to the information they hope to acquire. AIPAC has contended that the alleged contributions in this case involved communications to AIPAC's own members, which are specifically exempted from the statutory definition of "expenditure." See note 5, *supra*. The Commission rejected that argument and found probable cause to believe that AIPAC had violated the ban on corporate campaign expenditures and contributions set forth in 2 U.S.C. 441b. The FEC declined to take further action with respect to that finding, however, because it believed that the case "presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this." Pet. App. 98a; see note 5, *supra*. Respondents have not challenged the Commission's authority to exercise its prosecutorial discretion in that manner.

Even under the court of appeals' view of the statute, any finding that AIPAC is in violation of the FECA provisions governing political committees would depend upon the antecedent determination that the

communications at issue are properly characterized as contributions—*i.e.*, that they were sent to persons other than AIPAC's own members. That is the same determination that the Commission regarded as sufficiently close so as to warrant a decision to take no further action with respect to Section 441b.[11] Those circumstances make it especially uncertain whether the Commission would attempt to compel disclosure of all of AIPAC's receipts and disbursements, even if this Court were to affirm the court of appeals' ruling on the merits.

II. THE FEDERAL ELECTION COMMISSION DID NOT ACT IN A MANNER "CONTRARY TO LAW" IN FINDING NO PROBABLE CAUSE TO BELIEVE THAT AIPAC WAS A POLITICAL COMMITTEE UNDER 2 U.S.C. 431(4)(A) AND THEREFORE HAD VIOLATED 2 U.S.C. 433 AND 434

If this Court concludes that respondents satisfy the requirements of Article III and were "aggrieved" by the Commission's dismissal of their complaint, the

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[11] The Commission's statement of reasons in this case, issued on July 27, 1992, noted that the FEC "anticipate[d] the Commission soon will conduct a regulatory proceeding to review its membership criteria in an effort to eliminate confusion about these requirements." Pet. App. 99a. In 1993 the Commission promulgated a new regulatory definition of the term "member." See 58 Fed. Reg. 45,775 (codified at 11 C.F.R. 114.1(e)(2)). During the pendency of the appeal in this case, the D.C. Circuit held that regulation to be invalid, concluding that it defined the term "member" in an unduly restrictive fashion. See *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 604-606 (D.C. Cir. 1995). That decision casts further doubt on respondents' prospects of ultimately obtaining an order compelling disclosure of AIPAC's receipts and disbursements.

judgment of the court of appeals should be reversed on the merits. Under 2 U.S.C. 437g(a)(8)(C), respondents may prevail only if the FEC's dismissal of their complaint was "contrary to law." Because the Commission's disposition of their complaint was consistent with this Court's decisions construing the Act's political committee provisions, respondents cannot make that showing.

A. This Court's Precedents Hold That An Organization Will Be Deemed A Political Committee Under The FECA Only If The Organization's Major Purpose Is Campaign-Related Activity

The FECA defines the term "political committee" to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A). On its face, the statute provides no exception for organizations whose campaign-related spending, while exceeding the $1,000 threshold, is a minor part of the group's overall operation. This Court's decisions, however, have construed the Act's political committee provisions to apply only to organizations whose major purpose is campaign-related activity.

1. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed a wide range of issues concerning the interpretation and constitutionality of the FECA. In discussing the financial disclosure requirements imposed by the FECA, the Court observed that

> [t]o fulfill the purposes of the Act [the term "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79. *Buckley* involved this Court's resolution of a broad array of certified constitutional questions, see, *e.g.*, *id.* at 84 n.113, and the Court's analysis of the political committee provisions did not focus on the application of those provisions to any particular organization or pattern of spending. Rather, the Court asserted—apparently as a categorical matter—that the statutory provisions pertaining to political committees would apply only to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79.[12]

2. In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court reaffirmed the "major purpose" test for status as a political committee. A plurality of the *MCFL* Court stated that "[i]n [*Buckley*] this Court said that an entity subject to

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[12] The current definition of "political committee" contained in 2 U.S.C. 431(4)(A) was reenacted without substantive change in 1980 (see Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339; compare *Buckley*, 424 U.S. at 145 (quoting prior definition)) after this Court's decision in *Buckley*. Because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), that reenactment suggests congressional acquiescence in the construction of "political committee" articulated by this Court in *Buckley*.

regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" *Id.* at 252 n.6 (quoting *Buckley*, 424 U.S. at 79).

MCFL had spent nearly $10,000 in publishing a "Special Edition" of its newsletter. See 479 U.S. at 244. The Court squarely held that the "Special Edition" contained "express advocacy" of the election or defeat of identified candidates, and that the payments made to publish it were therefore independent "expenditures" within the meaning of the Act. *Id.* at 248-251. The Court nevertheless concluded that MCFL was not a political committee. The plurality stated that it was "undisputed on this record" that MCFL did not fall within the *Buckley* Court's definition of "political committee" because MCFL's "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Id.* at 252 n.6; see also *id.* at 252 ("If it were not incorporated, MCFL's obligations under the Act would be those specified by § 434(c), the section that prescribes the duties of '[e]very person (other than a political committee).'"). And the majority observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. Thus, while squarely holding that MCFL had made campaign expenditures well in excess of $1,000 during the year in question, the Court determined that MCFL was not a political committee, based on its finding that campaign-related activities were not the organization's major purpose.

3. The *Buckley* Court's articulation of the "major purpose" test could plausibly be characterized as dicta. In *MCFL*, however, the existence of a "major purpose" limitation on the Act's political committee provisions was central to the reasoning both of the four-Justice plurality opinion and of Justice O'Connor's concurrence.[13] As we explain above (see note 3, *supra*), the *MCFL* Court recognized a narrow, constitutionally based exception to Section 441b's ban on corporate campaign expenditures. In explaining the need for such an exception, the *MCFL* plurality emphasized that "[b]ecause it is incorporated, * * * MCFL must establish a 'separate segregated fund' if it wishes to engage in any independent spending whatsoever." 479 U.S. at 253. That separate segregated fund, the plurality observed, would be subject to the organizational and recordkeeping requirements that apply to political committees. *Id.* at 253-254; see 2 U.S.C. 431(4)(B) (definition of "political committee" includes "any separate segregated fund established under the provisions of section 441b(b) of this title"). The thrust of the plurality's analysis was that

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[13] In *MCFL*, moreover, the parties directly joined issue with respect to the existence of a "major purpose" limitation on the statutory definition of "political committee." MCFL argued that "[t]he definition of a political committee encompasses groups under the control of a candidate or the major purpose of which is the nomination or election of a candidate, * * * unquestionably not the case for MCFL." MCFL Br. 45 (No. 85-701) (citing *Buckley*, 424 U.S. at 79). The Commission disputed the existence of a major purpose test; relying on the "express terms" of Section 431(4)(A), the FEC argued that "MCFL's expenditure of more than $9,000 on its special election edition would make it a political committee under the terms of the statute * * * if that expenditure had been lawful." FEC Reply Br. 31-32 n.38 (No. 85-701).

MCFL, by reason of its corporate status (and consequent need to engage in campaign activity through a separate segregated fund), was subject to significant burdens to which a similarly-situated unincorporated organization would not be subject. See 479 U.S. at 252-253 ("All unincorporated organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to" the provisions of 2 U.S.C. 434(c), which governs persons other than political committees).

The plurality concluded that "[t]hese additional regulations may create a disincentive for such organizations to engage in political speech," 479 U.S. at 254, explaining that "while § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses," *id.* at 255. The Court held that, because of the three essential features that obviated the concerns underlying Section 441b, see note 3, *supra*, imposition of those burdens upon MCFL was not supported by any compelling government interest. For that reason, Section 441b's prohibition on corporate campaign expenditures was unconstitutional as applied to MCFL. See *id.* at 256-263. Justice O'Connor's (decisive) vote was similarly based on her conclusion that the organizational requirements applicable to a separate segregated fund would pose substantial and unjustified burdens on MCFL. See *id.* at 266 (O'Connor, J., concurring in part and concurring in the judgment).

Thus, five Justices in *MCFL* concluded that the FECA requirements applicable to political committees were sufficiently onerous to warrant a limited constitutional exemption from Section 441b's requirement that any corporate independent campaign expenditures be made through a separate segregated fund. That exemption would not, however, have alleviated the burdens associated with the establishment of a separate segregated fund if MCFL itself had been treated as a political committee. The *MCFL* Court's assertion that MCFL was not a political committee, and its reiteration of the "major purpose" test, were therefore central to the Court's disposition of the case.

B. The Commission's Finding Of No Probable Cause To Believe That AIPAC Was A Political Committee Under 2 U.S.C. 431(4)(A) Was Consistent With This Court's Decisions

In the instant case, the Commission applied the "major purpose" test and found no probable cause to believe that AIPAC had violated 2 U.S.C. 433 and 434, the organizational and reporting requirements applicable to political committees. In the report on which the Commission based its findings (see note 4, *supra*), the General Counsel

> conclude[d] that AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and do[ ] not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

J.A. 146; see J.A. 37-38 ("AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization."); Pet. App. 43a. Consistent with the recommendation of the General Counsel, the Commission unanimously found no probable cause to believe that AIPAC had violated Sections 433 and 434. Pet. App. 95a.[14]

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[14] As we explain above (see note 13, *supra*), the FEC's reply brief to this Court in *MCFL* disputed the existence of a major purpose test and argued that MCFL's election expenditures would have been sufficient, if lawful, to make the organization a political committee. This Court rejected that position. In recent years, the Commission has on at least two occasions (in addition to this case) articulated a major purpose test for political committee status. See Advisory Opinion (AO) 1995-11, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6148, at 12,065-12,066 (1995); AO 1994-25, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6125, at 12,001 (1994).

Two aspects of the Commission's application of the major purpose test, while not directly implicated by this case, warrant brief mention here. First, while the Court in *Buckley* defined political committees as organizations "*the* major purpose of which is the nomination or election of a candidate," 424 U.S. at 79 (emphasis added), the FEC has phrased the test as whether campaign-related activity is *a* major purpose of the organization. See AO 1995-11, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6148, at 12,065-12,066 ("the standard used is whether a major purpose of the organization is campaign activity"); AO 1994-25, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6125, at 12,001 (1994) ("the standard that has been used is whether a major purpose of the organization is to make expenditures or solicit contributions for the nomination or election of candidates"). The FEC's brief in the court of appeals in this case noted that "the Commission has said nothing that would foreclose it from finding that a large organization with more than one major purpose could qualify as a political committee." FEC C.A. In Banc Br. 42. Cf. *United States* v. *Harriss*, 347 U.S. 612, 622-623 (1954) (statute regulating persons whose "principal purpose" was to lobby Congress held applicable where lobbying was "one of the main purposes of" the person in question). Because the report on which the Commission relied concluded that "AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization," J.A. 37-38, that aspect of the "major purpose" test is not directly presented by this case.

Second, the Commission believes that an organization is a political committee if (1) electoral activity is a major purpose of the group, and (2) the group receives contributions and/or makes expenditures of more than $1,000 in a year for the purpose of influencing *federal* elections. In the FEC's view, so long as those characteristics are present, federal campaign activity need not be the group's major purpose. But see *FEC* v. *GOPAC, Inc.*, 917 F. Supp. 851, 853, 862 (D.D.C. 1996) (rejecting FEC's position and holding that "an organization is a 'political committee' under the Act if it received and/or expended $1,000 or more and had as its major purpose the election of a particular candidate or candidates for federal office"). That issue is likewise not presented by this case.

The court of appeals nevertheless concluded that "the factual findings already made by the FEC indicate that AIPAC should be classified as a political committee." Pet. App. 29a n.13. The court based its decision on the "plain terms" of Section 431(4)(A), together with the fact that "[t]he FEC found that AIPAC likely made campaign contributions in excess of $1,000." *Id.* at 29a. The court suggested two alternative bases for its conclusion that AIPAC should be treated as a political committee.

First, the court suggested that the "major purpose" test might appropriately be used simply as a means of determining whether a particular disbursement is an "expenditure" counting towards the $1,000 statutory threshold. See Pet. App. 26a (suggesting that "it is the purpose of the organization's disburse-

ments, not of the organization itself, that is relevant"); see also Br. in Opp. 2 (characterizing the "major purpose" test as "a criterion for determining *whether* an activity undertaken *independently* of a candidate *is* an election 'expenditure'"). On that theory, an organization that makes campaign expenditures (defined as disbursements whose major purpose is to influence federal elections) aggregating more than $1,000 per year is, *ipso facto*, a political committee, regardless of the substantiality of campaign activity in comparison to the group's overall operation. See Br. in Opp. 4 n.3. Second, the court of appeals noted that this Court in *Buckley* "clearly distinguished independent expenditures and contributions as to their constitutional significance." Pet. App. 24a. Although an organization making more than $1,000 in independent expenditures might not be a political committee if campaign activities were not its major purpose, the court held, an organization making more than $1,000 in contributions will always be a political committee. See *id.* at 24a-25a. Neither of those theories is consistent with this Court's precedents.

1. The "major purpose" test, as articulated in *Buckley* and *MCFL*, focuses unambiguously on the purpose of the organization, not on the purpose of a particular disbursement. In *Buckley* this Court stated that "[t]o fulfill the purposes of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*." 424 U.S. at 79 (emphasis added). Grammatically, the word "organizations" is the only possible antecedent for the phrase "of which." The ensuing pages of the *Buckley* opinion addressed the term "expenditure" as it applies to independent expenditures made by individuals and by groups other than political committees. See *id.* at 79-82. The Court construed the term in that context as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted). The Court did not suggest that it was articulating two different tests for an independent expenditure—*i.e.*, one employing the "express advocacy" requirement when applied to individuals and to groups other than political committees, and another employing the "major purpose" test to identify those disbursements counting towards the $1,000 threshold for political committee status. Indeed, respondents have never identified any reason for the Court to have formulated alternative tests for defining independent expenditures.[15]

This Court's subsequent decision in *MCFL* makes it particularly clear that the relevant inquiry focuses on the organization's major purpose, not on the major

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[15] After this Court's decision in *Buckley*, moreover, Congress amended the FECA to define "independent expenditures" as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17); see H.R. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976) (the term "independent expenditures" is "defined in the [1976 amendments] in conformity with the *Buckley* Court's definition"). That statutory amendment further undermines respondents' contention that the "major purpose" test should be used to define independent expenditures counting against the $1,000 threshold for political committee status.

purpose of an individual disbursement. Although MCFL had spent nearly $10,000 publishing a newsletter that contained "express advocacy" of the election or defeat of identified candidates (see 479 U.S. at 244, 248-251; page 34, *supra*), the plurality deemed it "undisputed" that MCFL did not meet *Buckley*'s definition of "political committee" because "[i]ts central organizational purpose [wa]s issue advocacy," 479 U.S. at 252 n.6. The majority observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. *MCFL* makes clear that it is "the organization's major purpose," *ibid.*—not the major purpose of any particular disbursement—that is dispositive of the "political committee" inquiry.

Moreover, a test focusing on the major purpose of a particular disbursement would not satisfactorily address the practical and constitutional problems potentially created by the Act's political committee provisions. A political committee is required to make comprehensive disclosures of *all* of its receipts and disbursements, even those that bear no direct relation to electoral campaigns. See, *e.g.*, 2 U.S.C. 434(b)(3)(G), 434(b)(6)(B)(v). There is consequently a significant danger that campaign-related expenditures by an organization that are but a small percentage of the organization's overall disbursements may trigger a far-reaching obligation to disclose *all* non-campaign-related receipts and disbursements, including receipts and disbursements used for issue advocacy. See pages 44-45, *infra*. A narrowing construction of the term "expenditure" alone would not alleviate that risk.

2. The court of appeals' primary rationale was its determination that the practical and constitutional concerns underlying the "major purpose" test are implicated only when the disbursements that exceed the $1,000 statutory threshold are independent expenditures rather than direct contributions or coordinated expenditures. See Pet. App. 24a-25a; see also *id.* at 20a, 29a. That premise is incorrect.

The Court in *Buckley* recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." 424 U.S. at 64; see also, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). The *Buckley* Court concluded that, as a general matter, the Act's disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68. The Court remained concerned, however, about the potential impact of the disclosure provisions upon groups and individuals "engaged purely in issue discussion." *Id.* at 79.

The Court addressed that concern in two distinct ways. With respect to independent expenditures by individuals and groups other than political committees, the Court construed the term "expenditure" as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80 (footnote omitted). The Court observed that "[t]his reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal

candidate." *Ibid.* So construed, the Court held, "the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81.

The disclosure requirements applicable to political committees, however, raise distinct concerns. Because of their particular importance in election campaigns, political committees are required to file regular reports of *all* of their receipts and disbursements, including those pertaining to issue advocacy not directly related to election campaigns. As applied to an organization whose campaign-related spending constitutes a small percentage of the overall operation, the Act's disclosure requirements could place substantial burdens on core First Amendment activities while contributing only slightly to the achievement of the statutory purposes. The *Buckley* Court addressed that danger by construing the term "political committee" as limited to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Because the receipts and disbursements of such organizations "are, by definition, campaign related," *ibid.*, application of the Act's broad disclosure requirements to "political committees" so defined can be expected to have little impact on non-campaign-related speech. The Court thus concluded that the purposes of both the Act and the First Amendment are properly served by construing the Act to require a group whose major purpose is campaign-related activity to report all of its receipts and disbursements, but not to impose such a broad reporting requirement (and attendant burdening of associational interests) on issue advocacy groups for whom

election expenditures are but a small percentage of their overall activities.

Thus, the limiting construction given to the statutory term "political committee" in *Buckley* serves to address the danger that relatively small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose the much broader category of non-campaign-related receipts and disbursements that are its primary activity, including receipts and disbursements used for issue advocacy. As the panel in this case correctly recognized (see Pet. App. 55a), that danger is equally present whether the triggering disbursements are independent expenditures or direct contributions.[16] The en banc court was therefore wrong in

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[16] As the en banc court of appeals correctly observed (see Pet. App. 21a-22a), this Court has recognized a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). That constitutional difference, however, is largely irrelevant to the basis for and proper application of the "major purpose" test. As applied to organizations that make independent expenditures, the point of the "major purpose" test is not to prevent application of the FECA's disclosure provisions to the independent expenditures themselves. To the contrary, the *Buckley* Court made clear that reporting of independent expenditures may constitutionally be required, even where the expenditure is made by a person other than a political committee. 424 U.S. at 80-82; see 2 U.S.C. 434(c) (persons other than political committees that make independent expenditures aggregating more than $250 must file disclosure reports). Rather, the "major purpose" test is designed to shield organizations that only occasionally make campaign-related expenditures from compelled disclosure of the *other* associational and communicative activities, unrelated

concluding (see *id.* at 24a) that the concerns underlying the *Buckley* Court's narrowing construction of "political committee" are inapplicable to organizations that make more than $1,000 per year in direct contributions or coordinated expenditures.[17]

3. The en banc court of appeals also criticized the Commission's approach on the ground that

> [t]he FEC's interpretation of "political committee" would * * * allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not.

Pet. App. 27a. That distinction is inherent in *Buckley*'s "major purpose" test, however, and the court of appeals' analysis does not eliminate the supposed anomaly. As we explain above, the court of appeals' primary rationale was that the "major purpose" test should apply only where a group's disbursements exceeding the $1,000 threshold are independent expenditures rather than contributions or coordinated expenditures. Even under that approach, "an organization spending its entire $1 million budget on [independent expenditures] would be a political committee, while another organization spending $1 million of its $100 million budget on [independent expenditures] would not." *Ibid.* The court of appeals did not explain why that disparity is acceptable in the context of groups making independent expenditures, but "would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of 'political committee'" (*ibid.*) when applied to groups making contributions or coordinated expenditures.

Any apparent anomaly disappears, moreover, once the justification for the *Buckley* Court's narrowing construction is understood. As we have explained, that construction addresses the danger that an organization might be subject to comprehensive disclo-

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to electoral campaigns, that are their primary enterprise. Application of the FECA's disclosure requirements to *those* organizations remains problematic regardless of the nature of the campaign activities that triggered the reporting requirements in the first instance.

[17] The court of appeals' decision has broad ramifications for issue-oriented, lobbying, and charitable groups that only occasionally make election expenditures. Although the court of appeals acknowledged that, "[o]nce designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200," Pet. App. 3a, the court made no effort to address the concerns that arise from applying those requirements to every group that has made contributions or coordinated expenditures exceeding $1,000 in a year.

Because corporations and labor unions are prohibited from making campaign contributions except through a separate segregated fund (see 2 U.S.C. 441b; page 7, *supra*), the court of appeals' decision has no effect on the range of lawful options available to those entities. At least in theory, however, the court's decision creates the possibility that a corporation or union making (illegal) contributions aggregating more than $1,000 in a year could be required to disclose all of its receipts and disbursements, including receipts and disbursements wholly unrelated to election campaigns, in addition to being subject to penalties for its violation of Section 441b.

sure requirements with respect to extensive non-campaign-related receipts and disbursements based on its relatively insignificant involvement in campaign activity. The hypothetical "organization spending its entire $1 million budget on campaign activity" (Pet. App. 27a), however, *has* no non-campaign-related receipts or disbursements. To treat such an organization differently from an organization that spends only 1% of its funds ("$1 million of its $100 million budget") on campaign activity is in no way anomalous. That disparity simply reflects the fact that the *Buckley* Court's concern—that the FECA's disclosure requirements might have the effect of unnecessarily burdening the non-campaign-related speech of an organization that only occasionally makes election expenditures—is implicated in one situation but not in the other.

Application of the "political committee" provisions to groups that only occasionally engage in campaign activity is unnecessary to ensure that significant contributions and independent expenditures are exposed to public view. Even if groups like AIPAC are not political committees, their campaign-related activity is nevertheless subject to reporting requirements. See page 4, *supra*. Such groups must file disclosure reports if they make independent expenditures aggregating more than $250 in a calendar year. 2 U.S.C. 434(c); see *MCFL*, 479 U.S. at 252-253 (plurality opinion). The Act also requires that contributions aggregating more than $200 from such groups to a candidate or political committee must be reported by the recipient. 2 U.S.C. 434(b)(3). To require groups that are minimally involved in campaign-related activity to report *all* of their receipts

and disbursements is thus unnecessary to effectuate the purposes of the Act.[18]

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[18] This Court has recognized that the Federal Election Commission "is precisely the type of agency to which deference should presumptively be afforded." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981); see also *id.* at 39 ("[I]n determining whether the Commission's action was contrary to law, the task for the [court] [i]s not to interpret the statute as it th[inks] best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted by a reviewing court.") (internal quotation marks omitted). The court of appeals nevertheless declined to give deference to the Commission's position here, stating that it was "not obliged to defer to an agency's interpretation of Supreme Court precedent." Pet. App. 19a. That reasoning was flawed.

Although the court of appeals characterized its task as the "interpretation of Supreme Court precedent," the court did not suggest that either *Buckley* or *MCFL* had declared the "major purpose" test to be inapplicable to groups making direct contributions. Rather, the court concluded that application of the Act's "political committee" provisions to such groups would not raise the concerns identified by the *Buckley* Court as the justification for the "major purpose" test. See Pet. App. 19a. To the extent that the Court's construction of a statutory term leaves open additional questions about the application of the provision, the policies supporting deference to an agency's expert resolution of those questions remain applicable. That is especially so where (as here) the choice between two methods of construing the statute rests in part on the evaluation of policy concerns—*e.g.*, the extent to which other FECA provisions will ensure adequate public scrutiny of campaign-related activity—as to which the Commission possesses special expertise.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 96-1590

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE and ORIN PARKER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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STATEMENT

Respondents are politically active voters who by writing and speaking seek to influence the views and actions of members of Congress, executive officials, and the public concerning U.S. foreign policy in the Middle East. Respondents filed a complaint with the Federal Election Commission (FEC or Commission) claiming that the American Israel Public Affairs Committee (AIPAC)--a wealthy lobbying group with a full-time paid staff, several offices, and an annual budget of nearly ten million dollars--is a "political committee" required by law to disclose the amounts and beneficiaries of its election campaign contributions. Pet. App. 2a. After investigation, the FEC found that AIPAC routinely has made undisclosed campaign contributions:

> AIPAC has made, in cooperation, consultation, or coordination with federal candidates, communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns.

J.A. 37; Pet. App. 3a-4a. Evidence obtained by the FEC showed that AIPAC's extensive contributions have been systematically carried out by its staff for many years. J.A. 43-97, 126-27; Pet. App. 3a-4a.[1]

Under 2 U.S.C. § 431(4), whether an organization making "contributions" is a "political committee" depends solely on a quantitative standard--whether the aggregate contributions are "in excess of $1,000 during a calendar year." The FEC found that AIPAC's campaign contributions "likely ... crossed

---

[1] Contrary to the unsupported assertion of amicus American Civil Liberties Union, ACLU Br. at 2, AIPAC's campaign contributions were neither sporadic nor small in amount. *See also* Pet. App. 29a, n. 13.

the $1,000 threshold," J.A. 146; Pet. App. 4a. Nonetheless, the FEC found "no probable cause to believe" that AIPAC is a political committee. J.A. 146; Pet. App. 4a, 95a. The FEC based this decision solely on its conclusion that

> AIPAC's campaign-related activities ... constitute only a small portion of its overall activities and does [sic] not appear to be its major purpose.... AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

J.A. 146; Pet. App. 4a. In announcing this holding the FEC neither discussed nor cited any precedents. *Id.*

Respondents filed suit. They contended that the FEC's "major purpose" standard is contrary to law. Though court holdings embrace a "major purpose" test, this test is different from the test announced by the FEC. Case law holds "major purpose" to be a criterion for determining *whether* an activity undertaken *independently* of a candidate *is* an election "expenditure." Case law does not apply any "major purpose" test at all to "contributions"--expenditures that are not independent, but coordinated with candidates. Nor does case law hold that an organization spending more than $1,000 annually on elections--whether independently or in coordination with candidates--is exempt from "political committee" status if election spending is merely "a small portion" of the group's undertakings.

Respondents argued below that a political group like AIPAC is not exempt simply because its wealth enables it to make large campaign contributions using only a small portion of its ten million dollar budget. Rather, the Constitution

exempts from political committee status only small issue-advocacy groups that limit their campaign activities to occasional, independent expenditures, and that are *so* small that administrative requirements imposed on political committees would unduly burden them, *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), or small, unpopular groups that would be harassed if they complied with political committee disclosure obligations. *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982).[2]

The FEC asserted, however, as it does here, that obiter dicta in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), imposes the Commission's major purpose test. The en banc Court of Appeals disagreed. The court acknowledged that the *Buckley* dicta could be read literally to support the Commission's view, App. 21a; but the court undertook a deeper analysis. It examined what the FEC's brief ignores--the lower court cases which the *Buckley* dicta cited. Pet. App. 25a-26a, and n. 11. These cases--*United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) (*NCFI*) and *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (*ACLU*) (three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975)--are the only precedents in which "major purpose" is an element of the holding, rather than dicta. The Court of Appeals held that these cases, and the court's discussion in *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), reject the FEC's view. It held the cases support respondents' interpretation of the major purpose test, under which "it is the purpose of the

---

[2] *MCFL* and *Brown* exempt groups from specific administrative or disclosure obligations, rather than from political committee status, itself. There is no claim that AIPAC qualifies for exemption under either *MCFL* or *Brown*.

organization's disbursements, not of the organization itself, that is relevant." Pet. App. 26a.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that respondents have standing, under both the Article III and zone-of-interests tests, to seek disclosure of the beneficiaries and amounts of AIPAC's campaign contributions. Pet. App. 6a-18a. The standing issue is neither novel nor complex. Respondents are voters who seek disclosure of information which Congress specifically intended voters to have--both to aid their own exercise of the franchise and to enable politically-active voters, such as respondents, to inform other voters, government officials, and the public at large.

The only difference between respondents and litigants under the Freedom of Information Act is that respondents seek an order requiring the government to enforce disclosure obligations applicable to a third party, rather than to disclose information the government already has. This difference raises only the questions of causation and redressability, which the court below correctly resolved. Since the FEC's erroneous legal interpretation was the agency's sole reason for exempting AIPAC from the disclosure requirement that respondents seek to enforce, respondents' injury is directly traceable to the administrative ruling they challenge. The FEC does not dispute this point. A ruling on the merits in respondents' favor would establish AIPAC's legal obligation to disclose the information respondents seek. A disclosure order by the FEC is the natural, appropriate, authorized, and available remedy to enforce that obligation. In these circumstances, it cannot be said, as a matter of law, that respondents' likelihood of obtaining redress is merely speculative. To the contrary, it is the FEC's opposing assertions that are mere speculation.

On the merits, the Court of Appeals properly held that the FEC's major purpose test is contrary to law. Pet. App. 18a-29a. While dicta originating in *Buckley* can be read to support the Commission's view, the FEC ignores that this same dicta approved lower court holdings that announced a very different test. No holding by this Court supports the Commission's position.

The fundamental goal of the Campaign Act is to prevent *quid pro quo* corruption and the appearance of that corruption stemming from large campaign contributions. Given this goal, the *amount* of an organization's undisclosed contributions, not whether the amount constitutes a major or minor part of the organization's budget, is the relevant consideration. The Court of Appeals properly held that the Commission's major purpose test "would wholly eviscerate" the statute, since "an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget would not." Pet. App. 27a. The FEC's erroneous major purpose test would eviscerate the statute by exempting AIPAC from any obligation to disclose its campaign contributions. No other disclosure provision besides that applicable to political committees would ensure that AIPAC's campaign contributions are revealed.

The FEC's major purpose test is neither necessary to avoid the danger the FEC has identified, nor effective in achieving avoidance of that danger. Though the Act requires political committees to disclose all of their receipts and disbursements, the FEC's test is not necessary to avoid compelled disclosure of the portion of a group's activities that are not campaign-related. Large, wealthy, sophisticated organizations like AIPAC can easily avoid this danger simply by administrative arrangements establishing for campaign activity either a

separate organization or a special segregated fund. Groups whose activities present no appearance or danger of *quid pro quo* corruption, and that would be unconstitutionally burdened by these administrative arrangements, or harrassed if disclosure occurred, are entitled to appropriate exemption under the First Amendment.

In cases such as AIPAC's, where an organization not entitled to constitutional exemption has used a portion of its budget for campaign activities, without making administrative arrangements to separate those activities from pure issue advocacy, the FEC may use its enforcement discretion to limit compelled disclosure to just the campaign-related activities. Respondents here seek only such an order. The FEC's major purpose test therefore is not necessary to avoid the danger of overbroad disclosure.

Nor would the FEC's test prevent compelled disclosure of pure issue advocacy. The FEC's test requires that campaign activity be only *a* major purpose, not necessarily *the* major purpose of an organization, in order to subject the organization to disclosure of all receipts and disbursements. Pet. Br. 38-39, n. 14. Under the FEC's test, groups whose primary activity is issue advocacy still would be subject to disclosure of those activities if campaign activity also were a major organizational purpose.

Simply put, the FEC's major purpose test makes no sense.

ARGUMENT

I. Respondents Have Standing to Sue

A. Respondents Meet the Article III Test

Non-disclosure of information, revelation of which is required by law, is injury sufficient to confer standing under Article III. *Public Citizen v. Department of Justice*, 491 U.S. 440, 449-50 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). If this were not true, no one would ever have standing to contest in federal court a federal agency's refusal to disclose information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. Like FOIA litigants, respondents requested disclosure through administrative proceedings authorized by statute and filed suit under a statute specifically conferring a right of judicial review.[3]

Respondents' injury is not a "generalized grievance." As the Court held in *Public Citizen*,

> The fact that other [voters] or groups of [voters] might make the same complaint after unsuccessfully demanding disclosure under [the Campaign Act] does not lessen [respondents'] asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.

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[3] Under 2 U.S.C. § 437g(a)(1), "[a]ny person who believes a violation of [the Campaign] Act . . . has occurred, may file a complaint with the Commission." Another provision of the Act, § 437g(a)(8)(A), states that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may seek judicial review.

491 U.S. at 449-450.

The only difference between respondents and FOIA litigants is that respondents seek an order requiring the government to enforce disclosure obligations applicable to a third party, rather than to disclose information the government already has. This difference raises only the questions of causation and redressability, which the Court of Appeals analyzed in detail and correctly resolved. Pet. App. 14a-15a.

Since the FEC's erroneous legal interpretation was its sole reason for exempting AIPAC from the disclosure requirement that respondents seek to enforce, respondents' injury is directly traceable to the administrative ruling they challenge. The FEC's brief does not dispute this point, which establishes causation. *Bennett v. Spear*, 117 S. Ct. 1154, 1164 (1997) ("injury produced by determinative . . . effect upon . . . someone else" is "fairly traceable" to that effect; standing does not require "injury as to which the defendant's actions are the very last step in the chain of causation").

It is also "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 1163. Judicial correction of the agency's legal error will, under the FEC's own findings, obligate AIPAC to disclose the information respondents seek.[4] The FEC does not argue that

[4] The FEC erroneously argues that respondents lack standing because the FEC might, under *Chamber of Commerce v. FEC*, 69 F. 3d 600 (D.C. Cir. 1995), reverse its prior finding that AIPAC's communications to its supporters were contributions rather than exempt intra-corporate communications. Respondents recognize that this issue needs to be revisited by the Commission on remand. At that time, respondents will argue that (1) *Chamber of Commerce* does not require reversal of the (footnote continued)

an order requiring AIPAC to disclose the amounts and beneficiaries of its campaign contributions would be unconstitutional. *See* Pet. Br. at 48. The FEC argues only that AIPAC should not be obliged to disclose "non-campaign-related receipts and disbursements." Pet. Br. at 42. Respondents, however, do not seek disclosure of AIPAC's non-electoral activities.

The FEC does not dispute that, if AIPAC has a legal obligation to disclose the beneficiaries and amounts of its campaign contributions, the Commission has authority to order AIPAC to disclose this information. A disclosure order is the appropriate, natural remedy for violation of a disclosure obligation. This remedy is available here. The FEC's suggestion, Pet. Br. 29, that disclosure might not be an available remedy, because AIPAC might not have "retained

FEC's finding; (2) alternatively, even if AIPAC's communications were intra-corporate, and therefore not contributions themselves, the campaign contributions generated by those communications were contributions by AIPAC, making AIPAC a political committee, because the contributors acted on behalf of, and through, AIPAC, *see* Pet. Br. at 9, n. 3 (AIPAC not only communicated to supporters, but acted "as a contact between its supporters and various candidates"); and (3) there is evidence, and evidentiary leads which the FEC failed to explore, pointing to significant campaign contributions by AIPAC of a kind other than staff communications to supporters, *see* the opening brief respondents submitted to the appellate panel below, at 10-28; *see also* Pet. App. 29a, n. 13 ("investigation here likely would have been insufficient to support a finding that AIPAC's contributions were not 'a' major purpose"). If respondents prevail on any of these three points, and prevail on the "major purpose" issue, AIPAC will be obligated to disclose its campaign contributions. Respondents therefore have standing to present these points, as part of their claim on the merits. Contrary to the FEC's erroneous argument, the need to revisit a prior FEC finding does not deprive respondents of standing to sue. Standing does not turn on whether a plaintiff's arguments on the merits are likely or unlikely to succeed.

the information sought by respondents," is absurd. The notion that AIPAC's staff, leadership, and thousands of dues-payers all cannot remember which candidates AIPAC supported in past elections, that they all might have forgotten what they did to support the election campaigns, that the AIPAC staff might have forgotten what their salaries were, and that there might be no records indicating anything on any of these subjects, is belied not only by a casual reading of the Joint Appendix, but by common sense and the voluminous evidence and evidentiary leads contained in the remainder of the administrative record.

The FEC's assertion, Pet. Br. at 29, that it is "far from clear" and there is "no guarantee" that disclosure will be ordered, if unlawful failure to disclose is found, is itself mere speculation. A similarly speculative assertion could be made in every case challenging the FEC's dismissal of an administrative complaint. Mere speculation cannot render a natural, appropriate, authorized, and available remedy "unlikely," as a matter of law.[5]

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[5] The foregoing is dispositive, but it is noteworthy that the FEC has not even asserted that it would be unlikely to issue, or would be opposed to issuing, an order requiring AIPAC to disclose the beneficiaries and amounts of its campaign contributions, if the Court were to hold AIPAC obliged to disclose this information. The FEC has not identified a single administrative or judicial decision in which a fine, rather than a disclosure order, was held to be the appropriate remedy for violation of the Campaign Act's disclosure obligations. Nor has the FEC explained why a fine would be appropriate, or likely, where disclosure is an available remedy. The Court of Appeals held "that if the Commission gave only lip service to compliance with our order and settled with AIPAC without requiring disclosure, . . . [respondents] would be able to seek disclosure directly" under 2 U.S.C. § 437g(a)(8)(C). Pet. App. 15a. The FEC's brief does not dispute this holding.

B. Respondents Meet the Zone of Interests Test

Respondents also meet the non-constitutional, zone-of-interests test for standing. This test "is not meant to be especially demanding." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that two of the three purposes of the Campaign Act's disclosure requirements were intended to serve the information interests of the public, the electorate, and each individual voter:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office.
>
> * * *
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.
>
> * * *
>
> Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations [established by other sections of the campaign finance law].

424 U.S. 67-68. (Footnotes omitted.)

The Campaign Act recognizes that ballot-box decisions by individual voters are a primary means of fighting the threat and appearance of *quid pro quo* corruption involving elected officials and campaign contributors. The Act recognizes that

each individual voter is entrusted with governmental power, equal to that of every other voter, to decide which candidates are, or may be, corrupted by campaign contributions, and to cast their ballots accordingly. The disclosure provisions of the statute are intended to arm voters with information about campaign contributions to better enable them to make their individual ballot-box decisions. The interest of each voter in information about campaign contributions is squarely within the zone of interests intended to be served by the statute.

The Campaign Act also recognizes that another potent weapon against corruption, and the appearance of corruption, is publicity. Publicity is the principal means by which voters receive campaign finance information useful to their exercise of the franchise. Publicity also is a direct weapon. It may induce officeholders to change views, reverse actions, or acknowledge errors before the next election, so that the electorate need not vote against them to achieve reform. Publicity also arms the public at large, empowering it to press officeholders for reform, where publicity by itself is an insufficient inducement. The information interests of the public, and the information interests of those who would inform officeholders and the public about campaign contributions, through speaking and writing, are plainly within the zone of interests intended to be served by the Act.

The Court of Appeals therefore properly held "that Congress treated the broad class--voters--as the core beneficiaries of the statute," Pet. App. 17a, and that for this reason respondents meet the non-consititutional test for standing.[6]

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[6] The FEC's argument, Pet. Br. at 22-23, that respondents' suit "rests on 2 U.S.C. § 437g(a)(8)(A)," and that this statute "should be given a narrow construction," is off the mark. The zone-of-interests test concerns the interests protected by the specific statute alleged to have been (footnote continued)

II. The FEC's "Major Purpose" Test is Contrary to Law

The FEC's "major purpose" test conflicts with the fundamental goal of the Campaign Act. This goal is to prevent corruption and the appearance of corruption that result when "large contributions are given to secure a political *quid pro quo* from current and potential office holders." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Given this goal, the *amount* of an organization's election spending, not whether the amount constitutes a major or minor part of the organization's budget, is the relevant consideration. The Court of Appeals properly held that the Commission's major purpose test "would wholly eviscerate" the statute, since "an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget would not." Pet. App. 27a.[7]

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violated. *Bennett v. Spear*, 117 S. Ct. 1154, 1167 (1997). Respondents claim that AIPAC violated disclosure obligations contained in 2 U.S.C. § 434. The FEC does not dispute that respondents, as voters, are core beneficiaries of these disclosure obligations.

[7] Contrary to the FEC's brief at 47, the reasoning of the Court of Appeals would not exempt from political committee status an organization devoting $1 million of its $100 million budget to independent expenditures, rather than contributions. The court held "it is the purpose of the organization's disbursements, not of the organization itself, that is relevant." Pet. App. 26a. Thus, if the major purpose of an organization's independent disbursements is to influence elections, then those disbursements are "independent expenditures." *NCFI*, 469 F.2d at 1141. All organizations that make independent expenditures exceeding $1,000 in a year are political committees, except to the extent a constitutional exemption under *MCFL* or *Brown* applies. Under *MCFL*, exemption of an organization would be warranted only if "the administrative burdens associated with such spending were unconstitutional as applied to it." Pet. App. 24a. A small organization like MCFL would be unconstitutionally burdened unless such spending were its major (footnote continued)

Given the goal of the statute, it makes no sense to exempt a dual-purpose organization simply because election spending is its "minor" purpose, carried out by one department, while other departments pursue the "major" purpose. This is particularly true if the organization's major purpose is lobbying for favors from legislators to whose campaigns the organization contributes. A systematic program of lobbying linked to campaign contributions, implemented continuously over a number of election cycles, presents both an appearance and a danger of *quid pro quo* corruption. "[C]ampaign-related activities and communications ... undertaken as an adjunct to, and in support of, ... lobbying efforts," J.A. 146--in other words, precisely what AIPAC does--are the principal concern of the Act.

Under the erroneous "major purpose" standard announced by the FEC, lobbying organizations that use campaign contributions to wield influence in Congress are exempt from political committee status if their size, wealth, and power enable them to attain their goals by spending on elections only "small portions" of their large bank accounts. This is not a permissible construction of the statute. It defeats the fundamental purpose of the law. Courts "must reject administrative constructions of the statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election*

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purpose. *Id.* AIPAC, however, is a large, wealthy, sophisticated organization that would not be burdened by compliance with administrative requirements. Nothing in the opinion below would exempt AIPAC from political committee status if it made large independent expenditures, as opposed to contributions, using a small portion of its large budget.

Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981).[8]

Contrary to the FEC's brief at 47, the FEC's proposed evisceration of the statute is not "inherent in *Buckley*'s 'major purpose' test." While a literal reading of dicta in *Buckley* could support the FEC's view, the *Buckley* dicta noted with approval the decisions in *NCFI* and *ACLU*, which adopted a very different test.

In *NCFI*, the court considered whether a $17,850 newspaper advertisement was an "expenditure," and whether "solely on the strength of this one advertisement and contributions made in response to it" the National Committee must be deemed a "political committee." *Id.* at 1138. To determine whether the advertisement was an "expenditure" the court construed the statutory definition's key phrase, "made for the purpose of influencing [an] ... election." Interpreting the statute to avoid First Amendment issues, *id.* at 1140, the court held

> We ... construe the words "made for the purpose of influencing" in [the statutory definitions of "contribution" and "expenditure"] to mean an expenditure made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents.... We also construe the Act to apply only to committees soliciting contributions or making *expenditures the major*

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[8] The FEC's major purpose test is also contrary to the statute's unambiguous quantitative standard--"in excess of $1,000 during a calendar year"--which governs whether an organization making campaign contributions is a political committee. For this reason as well, the FEC's test cannot be deemed a valid interpretation of the statute. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984).

> *purpose of which* is the nomination or election of candidates. [Emphasis added.]

469 F.2d at 1141.

Two points are important here. First, the *NCFI* court applied the "major purpose" test only to *independent* disbursements--those made without coordination with a candidate. Second, the court held "major purpose" to be a criterion for determining *whether* a particular independent disbursement *is* an election "expenditure." The court did not hold that an organization found to be making independent expenditures is exempt from the Act unless those types of disbursements are the major purpose of the organization overall.

Applying its holding to the advertisement at issue, the court concluded the ad was not an "expenditure":

> Here neither statutory test is met: any authorization or control by any candidate--indeed any connection whatsoever between the National Committee and any candidate--is missing and *the major purpose of the advertisement* was to promote the impeachment movement and to condemn governmental policy on the Vietnam war, *not to elect candidates*. [Emphasis added.]

469 F.2d at 1141.

Having announced this holding, the court went on to say, in dicta, that its interpretation of the phrase "for the purpose of influencing ... [an] election" might make "enforcement of the Act ... somewhat more burdensome, as the supervisory officials will be forced to glean the principal or *major purpose of the organizations* they seek to have comply with the Act." *Id.* at 1142. (Emphasis added.) In light of the court's analysis

and holding, its reference to "major purpose of the organizations" concerns the organizations' major purpose *in making particular disbursements*. The court did not address the major purpose of an organization in general, as distinguished from the organization's purpose in making particular payments. The court did not face, and had no reason to consider, a situation in which a group's major purpose, overall, might be different from the organization's major purpose in making a particular disbursement.

In *ACLU*, the court considered an advertisement similar to the ad in *NCFI*. The court adopted the *NCFI* holding. The court stated that holding as follows:

> [T]he Court [in *NCFI*] promulgated a dual statutory test limiting the reach of Title III: (1) the determinative phrase "made for the purpose of influencing," is to include only those expenditures "made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents," and (2) Title III is applicable "only to committees soliciting contributions or making *expenditures the major purpose of which* is the nomination or election of candidates." 469 F.2d at 1141.

366 F. Supp. 1057 (emphasis added). The phrase "major purpose of the organization" does not appear in *ACLU*.[9]

In *Buckley*, plaintiffs claimed the reporting and disclosure provisions applicable to political committees were overbroad "in their application to minor-party and independent candidates and in their extension to contributions as small as

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[9] The ACLU's amicus brief, at 16-17, mischaracterizes *NCFI* and *ACLU v. Jennings*.

$11 or $101." 424 U.S. at 61. No other challenge to these provisions was raised. *Id.* at 60.[10]

The *Buckley* plaintiffs also challenged former § 434(e) (now, 434(c)), the disclosure provision applicable to persons other than political committees. *Id.* at 61. The Court noted that disclosures required of these persons are of special concern because "the relation of the information sought to the purposes of the Act may be too remote." *Id.* at 79-80.[11]

In discussing this issue, the Court, in dicta, said the phrase, "for the purpose of . . . influencing [an] election," also should be narrowly construed in the provisions applicable to "political committees." This phrase, the Court reasoned, "could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79. The Court cited *NCFI* and *ACLU*, with approval, 424 U.S. at 79, n. 106, and then added:

> To fulfill the purposes of the Act [the words "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.

[10] The Court declined to issue a "blanket exemption" for minor parties, 424 U.S. 72-74, holding instead that they would be entitled to exemption from disclosure requirements upon showing "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74. The Court reaffirmed this approach in *Brown*. Under *Buckley* and *Brown*, the First Amendment grants exemption from disclosure only on an as-applied, case-by-case basis where specific showings are made.

[11] The Court held this concern properly could be met by deeming independent "expenditure" to mean "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80.

> Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Like *NCFI* and *ACLU*, *Buckley* said the problem lies in the vagueness and potential overbreadth of the phrase "for the purpose of influencing [an] election." As in *NCFI*, *Buckley*'s discussion of "major purpose" concerned the problem of determining when an organization's activities should be deemed "expenditures." The Court said that expenditures could be presumed to be campaign related if they were made by "an organization the major purpose of which is the nomination or election of a candidate."

The reasoning in *Buckley* did not conclude that the phrase "political committee," itself, must be given a narrowing construction *in addition to* that which results simply from construing narrowly the phrase "for the purpose of influencing ... [an] election." *Buckley* did not suggest that *two* "major purpose" tests apply--one to determine whether an activity is an expenditure, then another to determine whether making these expenditures is a group's major purpose overall. Nor is there any language in the statute that could bear such a construction.

The aim of the discussion in *Buckley* was to ensure that "groups engaged *purely* in issue discussion" would not be deemed "political committees." 424 U.S. at 79. (Emphasis added.) The Court did not address circumstances in which the major purpose of an organization, overall, might be different from the major purpose of one or more of the organization's expenditures. It did not consider the question of dual- or multi-purpose organizations. *Buckley* did not say that discussion groups which also make campaign disbursements "fall[ing] within the core area sought to be addressed by

Congress" are nonetheless exempt from regulation--no matter what the amount of their election spending--provided "issue discussion" is the major purpose of the organization overall.[12]

In *MCFL*, the Court mentioned "major purpose" in dicta discussing circumstances that would render a small issue advocacy group a political committee. As recounted in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, (1990), the *MCFL* Court held

> that a federal statute requiring corporations to make independent political expenditures only through special segregated funds, 2 U.S.C. § 441b, burdens corporate freedom of expression.... The Court reasoned that the *small* nonprofit corporation in that case would face certain organizational and financial hurdles in establishing and administering a segregated political fund.... These hurdles "impose[d] administrative costs that many *small* entities [might] be unable to bear" and "create[d] a disincentive for *such* organizations to engage in political speech." [Emphasis added.]

In addition to the burden that would be imposed on MCFL, due to its small size, the Court noted that MCFL was a nonprofit corporation with no funding from business

[12] During the ten years after *Buckley*, the FEC issued numerous advisory opinions applying the legal test for "political committee" designation. None of them suggested that an organization making "expenditures" or "contributions" exceeding $1,000 in a year would be exempt from "political committee" designation if these expenditures or contributions were a "small portion" of the organization's overall activities, or if election spending were not a major purpose, or not the major purpose, of the organization. Pet. App 28a, n. 12.

corporations or labor unions.[13] The Court also stressed that MCFL's election activity was limited to occasional independent expenditures. 479 U.S. at 252 and 252 n. 6.

The Court said that independent expenditures produce speech at the core of the First Amendment, 479 U.S. at 251, and that "restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* at 259-260. The Court held that MCFL's occasional independent political activity posed no "threat of the danger that has prompted regulation," and that administrative requirements which would burden the small organization therefore were not justified. *Id.* at 263. The Court, in dicta, at 262, added the following caveat:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U.S., at 79.

Thus, the *MCFL* dicta said that "extensive" independent election spending would render even a small "issue advocacy" organization a political committee. Nothing in the opinion implied that constitutional concerns require exemption of a wealthy organization that makes extensive campaign contributions in support of its lobbying, posing a potential threat of *quid pro quo* corruption. Nor did the Court say that its concern for the impact of administrative burdens on small organizations would extend to a large sophisticated organization with a full-time paid staff already accustomed to meeting many administrative requirements. The *MCFL* Court

[13] AIPAC, however, unlike MCFL, does receive some contributions from corporate bank accounts. J.A. 150-51; Pet. App. 25a, n. 10.

neither held nor suggested that a wealthy lobbying group routinely making contributions exceeding $1,000 per year is exempt from political committee designation, provided its contributions are only a "small portion" of its large budget.[14] Nothing in *MCFL* requires evisceration of the statute by an across-the-board narrowing construction based solely on "budget portion" or overall organizational purpose.

The FEC's major purpose test is not only contrary to the goal of the statute, but also unnecessary and insufficient to accomplish the FEC's objective. The FEC says that, since political committees have a statutory obligation to disclose all of their receipts and disbursements, not just those related to election campaigns, the Commission's major purpose test

> serves to address the danger that relatively small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose the much broader category of non-campaign-related receipts and disbursements that are its primary activity, including receipts and disbursements used for issue advocacy.

Pet. Br. at 45. But large, wealthy, sophisticated organizations like AIPAC can easily avoid this danger simply by administrative arrangements establishing, for campaign activity, either a separate organization or a special segregated fund.[15] *See Regan v. Taxation with Representation*, 461 U.S.

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[14] Nor did FEC advisory opinions issued after *MCFL* so hold or suggest. Pet. App. 28a, n. 12. It was only after this litigation began that FEC advisory opinions started to reflect the FEC's major purpose test. *Id.*

[15] Contrary to the assumption of amicus Brennan Center's brief, at 18, no new regulations are needed. AIPAC could have set up a separate segregated fund. AIPAC's leaders or supporters could have set up a separate organization.

540 (1983). Organizations whose activities present no appearance or danger of *quid pro quo* corruption and that would be unconstitutionally burdened by these administrative arrangements, or harrassed if disclosure occurred, would be entitled to appropriate exemption under the First Amendment.

In cases such as AIPAC's, where enforcement proceedings establish that an organization not entitled to constitutional exemption has used a portion of its budget for campaign activities, without making administrative arrangements to separate those activities from pure issue advocacy, the FEC may use its enforcement discretion to limit disclosure orders to just the campaign-related activities. Respondents here seek only such an order. Any organization subjected to an unconstitutionally-overbroad FEC disclosure order would be entitled to challenge the order in court and obtain appropriate relief. The FEC's major purpose test therefore is not necessary to avoid the danger of overbroad disclosure.

Nor would the FEC's major purpose test accomplish the goal the FEC seeks to attain. Since the FEC's test requires that campaign activity be only *a* major purpose, not necessarily *the* major purpose of an organization, in order to subject the organization to disclosure of all receipts and disbursements, Pet. Br. 38-39, n. 14, groups whose "primary activity" is issue advocacy still would be subject to disclosure of those activities if campaign activity also were a major organizational purpose.

The FEC's test, which is entitled to no deference,[16] is not only unnecessary and ineffective, but also overbroad. As

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[16] The FEC maintains that its major purpose test is a narrowing construction required by constitutional concerns. These concerns, however, are not within the Commission's special expertise. The FEC's view of the Constitution is entitled to no deference. *See* Pet. App. 20a.

noted above, the test would eviscerate the statute by exempting from disclosure not only non-campaign activities, but also campaign contributions. The FEC asserts that its test ensures that campaign expenditures in "small amounts" or made "only occasionally" will not trigger obligations to disclose non-campaign-related activity, Pet. Br. at 21, but AIPAC's contributions were neither small in amount, nor occasional, Pet. App. 3a-4a, 29a, n. 13., and the FEC's test is not limited to circumstances involving small or occasional contributions. On the contrary, the FEC's test would exempt organizations that flood every election with millions of dollars of contributions, provided they spend many more millions of dollars for other purposes--such as lobbying for favors from the officials whom the campaign contributions helped to elect.

Contrary to the FEC's brief at 48, the disclosure obligations applicable to others are no substitute for the statutory requirement that political committees disclose their campaign contributions. The obligation to disclose independent expenditures does not apply, because AIPAC's activities are contributions, not independent expenditures. The recipients' obligation to report contributions they receive is ineffective, since candidates and their committees do not know all of the campaign activities undertaken on their behalf by AIPAC, let alone the amount of money AIPAC has spent on them.[17] It is AIPAC that knows this information. It is AIPAC that must be ordered to disclose it.[18]

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[17] The FEC has access to every candidate's disclosure statements, yet it has not identified a single one that has reported receiving any of AIPAC's extensive in-kind campaign contributions.

[18] These points aside, the Court of Appeals properly held the FEC's argument about other statutory obligations to be irrelevant, since "[t]here is no indication that Congress intended to limit one section in light of others or to make their application mutually exclusive." Pet. App. 27a.

This is a simple case. The FEC's major purpose test makes no sense. It is unnecessary to accomplish the FEC's objective. It is ineffective at accomplishing that objective. It would eviscerate the statute by exempting campaign contributions from disclosure.

AIPAC meets the statutory definition of a "political committee" because it routinely makes "contributions" to candidates in aggregate amounts likely exceeding $1,000 per year. Nothing more is required. The statutory obligations imposed on political committees are not unconstitutional as applied to AIPAC. The *MCFL* exemption applies to organizations that only occasionally make independent expenditures posing no threat or appearance of corruption, where the organization, due to its small size, would be unduly burdened by the Act's administrative requirements. AIPAC's election activities are "contributions," not "independent expenditures." They are not "occasional." They are extensive, multi-year activities presenting an appearance and potential threat of *quid pro quo* corruption. AIPAC is a large, sophisticated organization with a paid full-time staff that would not be unduly burdened by the administrative duties imposed by the Act. AIPAC made no such claim during the FEC proceedings, and nothing in the record would support such a finding. Nor is there any basis for exemption of AIPAC under *Brown*.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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A. Respondents lack standing to bring this suit.

1. Respondents assert (see Br. 11-12) that the dismissal of their administrative complaint by the Federal Election Commission (FEC or Commission) causes them injury as voters by depriving them of information that might assist them in their exercise of the franchise.[1] We agree with respondents that

[1] Respondents do not explicitly press the contention that they have standing as "competitors" of the American Israel Public Affairs Committee (AIPAC). Compare J.A. 11 (complaint in this lawsuit alleges that respondents "are politically active persons who * * * oppose AIPAC views on U.S.

voters are among the intended beneficiaries of the disclosure provisions of the Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.* See FEC Br. 26-27; *Buckley* v. *Valeo*, 424 U.S. 1, 66-68 (1976) (per curiam). Absent any basis for concluding that respondents' interests as voters serve to differentiate them from the public generally,[2] however, respondents' asserted injury amounts to nothing more than "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). "[T]hat harm alone normally does not warrant exercise of jurisdiction." *Ibid.*; see *Allen* v. *Wright*, 468

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foreign policy in the Middle East"; that they "compete with AIPAC in seeking to influence the views and actions of members of Congress, executive policymakers, and the public"; and that the FEC's dismissal of their administrative complaint "has given AIPAC an illegal advantage in this competition"). Respondents suggest (Br. 4), however, that their interests as "voters" include an interest in "inform[ing] other voters, government officials, and the public at large." See also *id.* at 12 (asserting that the FECA protects "the information interests of those who would inform officeholders and the public about campaign contributions, through speaking and writing"). To the extent that respondents' conception of voter standing encompasses the competitive injury more directly alleged in their complaint, respondents' argument fails for the reasons stated at pages 24-27 of our opening brief.

[2] The court of appeals at least acknowledged that "it would not be enough for standing in this case for appellants to assert only that they were voters." Pet. App. 12a. The court nevertheless concluded that respondents had standing to sue as "affected voters" because there was "nothing to indicate that [respondents] did not vote in various federal elections in which AIPAC allegedly made contributions." *Id.* at 13a. As we note in our opening brief (Br. 28), that theory would apply equally to all registered voters in the United States.

U.S. 737, 755-756 (1984). To hold that *every voter* in the country has standing to bring a suit such as this one would be especially anomalous in light of the background rule that the government's decision not to undertake an enforcement action is ordinarily not reviewable at all. See FEC Br. 23, 29.[3]

2. Amicus Common Cause asserts (Br. 20) that "respondents have standing as individuals denied procedural rights created by the FECA," on the theory that the Commission's unlawful dismissal of an administrative complaint "deprives the particular complainant of a right to have his or her complaint treated in accordance with the procedures and standards established by the FECA." That argument cannot be reconciled with *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992), in which this Court squarely rejected the proposition that a government agency's violation of a "procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)."

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[3] Apart from the narrow circumstances of 2 U.S.C. 437g(a)(8)(C), Congress completely barred private actions under the FECA and made the Commission's power to initiate civil actions the "exclusive civil remedy for the enforcement" of the Act. 2 U.S.C. 437d(e). Thus, contrary to amicus Common Cause's assertion (Br. 18 n. 15) that the Act was drafted to encourage so-called private attorneys general, Congress limited such actions to the rare occasions when the Commission unlawfully dismisses a complaint and then fails to "conform with [a court's] declaration" that the "dismissal of the complaint * * * [was] contrary to law." 2 U.S.C. 437g(a)(8)(C). See *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 488-489 (1985); *Perot* v. *FEC*, 97 F.3d 553, 558 & n.2 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1692 (1997).

Accord *Common Cause* v. *FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) ("absent the ability to demonstrate a 'discrete injury' flowing from the alleged violation of FECA, [an administrative complainant] cannot establish standing merely by asserting that the FEC failed to process its complaint in accordance with law") (citing *Defenders of Wildlife*).

The argument is also inconsistent with the text of the judicial review provision under which respondents brought this suit. That provision states that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1) * * * may file a petition with the United States District Court for the District of Columbia." 2 U.S.C. 437g(a)(8)(A). To file suit under that provision, a potential litigant must demonstrate that his administrative complaint was dismissed by the Commission *and* that he was "aggrieved" by the dismissal. The latter requirement would be superfluous if a complainant were deemed to possess a judicially enforceable right to a "lawful" disposition of his complaint.[4]

3. Respondents, like the court of appeals, unduly minimize the obstacles to redressability that exist in this case. Respondents assert (Br. 9) that "if AIPAC

[4] Amicus Common Cause is also wrong in asserting (Br. 21) that the Act affords a right to "personal participation" by administrative complainants once their complaints are filed with the Commission. After that point, it is the administrative respondent—not the administrative complainant—who has certain statutory rights to be notified and to respond. See 2 U.S.C. 437g(a)(2)-(6). Indeed, an administrative complainant is not entitled to learn about the substance of any Commission investigation undertaken in response to his complaint until the Commission's proceeding is concluded. 2 U.S.C. 437g(a)(12).

has a legal obligation to disclose the beneficiaries and amounts of its campaign contributions, the Commission has authority to order AIPAC to disclose this information." That is incorrect. The FECA does not authorize the Commission to issue such enforcement orders. If the Commission finds "probable cause" to believe that a private party has violated the Act, it may attempt to negotiate a conciliation agreement. 2 U.S.C. 437g(a)(4)-(5).[5] If that effort is unsuccessful,

[5] Nothing in the FECA, however, would require that such a conciliation agreement must provide for disclosure by AIPAC of prior receipts and disbursements. See FEC Br. 29-30. Nor would any conciliation agreement be subject to judicial review. Compare 2 U.S.C. 437g(a)(5) with 2 U.S.C. 437g(a)(8)(A).

Respondents rely (see Br. 10 n.5) on the court of appeals' assertion that "if the Commission gave only lip service to compliance with our order and settled with AIPAC without requiring disclosure, * * * [respondents] would be able to seek disclosure directly" under 2 U.S.C. 437g(a)(8)(C). Pet. App. 15a. We see no basis for the court's conclusion. Section 437g(a)(8)(C) provides that a reviewing court "may declare that the [Commission's] dismissal of the [administrative] complaint is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." The administrative complainant's right to file his own suit against the alleged violator is thus made contingent upon the Commission's failure to "conform with" the court's declaration.

If a court declares that the FEC has acted upon an erroneous understanding of the Act's "political committee" provisions, however, the Commission would not necessarily fail to "conform with" that declaration by settling with AIPAC upon terms that do not require the reconstruction of records that would be necessary to comply with the broad disclosure requirements applicable to political committees. Rather, the FEC should enjoy substantial authority to utilize a variety of

the Commission may institute a civil enforcement action in federal district court. 2 U.S.C. 437g(a)(6).[6] Nothing in the Act, however, authorizes the FEC to issue a remedial order that is binding on any private party. Even judicial review under 2 U.S.C. 437g(a)(8) of the Commission's dismissal of respondents' administrative complaint is "merely preliminary," because "authoritative judicial construction * * * [must] await actual enforcement" against AIPAC in an enforcement suit in which AIPAC's arguments and defenses would be presented and considered. *FEC* v. *National Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Thus, in contrast to the rulemakings and adjudications that are the typical subjects of Administrative Procedure Act review, the agency action (*i.e.*, the filing of an enforcement suit)

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settlement terms and conditions—*e.g.*, monetary penalties or commitments regarding future compliance—in light of such factors as the seriousness of the violation and the apparent good faith (or lack thereof) of the alleged violator. Cf. *Shepard* v. *NLRB*, 459 U.S. 344, 350-351 (1983). Neither 2 U.S.C. 437g(a)(8) nor any other provision of the FECA clearly authorizes a court to override the Commission's prosecutorial discretion by declaring that it is obligated either to negotiate a settlement that provides for broad disclosure of past receipts and disbursements, or to pursue an enforcement action seeking such relief. Particularly in light of the "general presumption of unreviewability" of an agency's decision not to undertake an enforcement action, *Heckler* v. *Chaney*, 470 U.S. 821, 834 (1985), the FECA's judicial review provision should not be read to accomplish that result.

[6] Even when mandatory conciliation attempts fail to produce a settlement agreement, however, the Commission is not required to initiate litigation. See 2 U.S.C. 437g(a)(6)(A) ("Commission *may*, upon an affirmative vote of 4 of its members, institute a civil action.") (emphasis added).

that respondents seek to compel will not, in and of itself, provide respondents with any relief.

Respondents' prospects of obtaining the disclosures they seek are therefore doubly attenuated. Unlike plaintiffs who file suit under the Freedom of Information Act, 5 U.S.C. 552, respondents do not seek to obtain information that is actually in the possession of the government; they seek to enlist the Commission's assistance in acquiring information from a private party not before the court. See FEC Br. 23-24 n.7. Second, the Commission cannot itself compel AIPAC to disclose whatever relevant information may remain in its possession, but must (absent a negotiated settlement) attempt to persuade another decisionmaker (a court) to order such relief. Compare *Defenders of Wildlife*, 504 U.S. at 568-571 (plurality opinion) (plaintiffs failed to establish redressability where any order running against the defendant agency would not be binding on a different agency whose conduct was the actual source of any injury plaintiffs might suffer). Respondents therefore cannot show that it is "'likely,' as opposed to merely 'speculative,'" *id.* at 561 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)), that resolution in their favor of the "political committee" issue will ultimately lead to disclosure of AIPAC's receipts and disbursements.[7]

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[7] As we explain in our opening brief (see Br. 10 n.5, 30-31 & n.11), AIPAC has consistently maintained that the alleged contributions in this case involved communications to its own members, which are specifically exempted from the statutory definition of "expenditure." During the pendency of the appeal in this case, the D.C. Circuit held that the FEC's regulatory definition of the term "member" was unduly restrictive. See *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 604-606 (1995),

B. If this Court holds that respondents have standing to bring their suit, the judgment of the court of appeals should be reversed on the merits.

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reh'g denied, 76 F.3d 1234 (D.C. Cir. 1996); FEC Br. 31 n.11. That decision, as we note in our opening brief (see Br. 31 n.11), adds an additional element of uncertainty concerning respondents' prospects of ultimately obtaining an order compelling disclosure of AIPAC's receipts and disbursements.

We do not agree, however, with AIPAC's assertion as amicus curiae (Br. 18) that the case is moot because it is "readily apparent that the Commission would" find AIPAC's supporters to be "members" if the FEC were to revisit the issue. The Commission has not had occasion to determine, in light of *Chamber of Commerce*, whether the recipients of AIPAC's communications were "members," and thus, in the Commission's view, that question is an open one. The D.C. Circuit itself acknowledged in its opinion on petition for rehearing in *Chamber of Commerce* that the "Commission still has a good deal of latitude in interpreting" the term "member." 76 F.3d at 1235. Indeed, the decision in *Chamber of Commerce* was issued *before* the en banc court's decision in the instant case, suggesting that the D.C. Circuit did not regard *Chamber of Commerce* as definitively resolving the question whether the recipients of AIPAC's communications were "members." In light of the Commission's own uncertainty regarding the impact (if any) of *Chamber of Commerce* on the FEC's prior membership determination in this case, cf. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (judicial review of agency action is typically confined to consideration of the grounds on which the agency based its decision), and the virtual absence of briefing on the question, there is no reason for this Court itself to resolve the issue in the first instance.

The Commission is now considering revising its rules governing who is a "member" of a membership association. On July 31, 1997, it published an Advance Notice of Proposed Rulemaking seeking comments from the public. 62 Fed. Reg. 40,982. No new regulation has yet been promulgated.

1. In our opening brief, we explain (Br. 31-49) that the Commission did not act "contrary to law" when it found no probable cause to believe that AIPAC was a "political committee" within the meaning of the FECA, because campaign-related activity was not the organization's "major purpose." The "major purpose" test, first announced in *Buckley*, 424 U.S. at 79, and reaffirmed in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), serves to ensure that occasional election-related disbursements do not subject an organization to the comprehensive disclosure requirements, covering all receipts and disbursements, that are applicable to political committees under the FECA.

Respondents' brief contains repeated references (see Br. 5, 13, 15 n.8, 22, 23, 25) to "the FEC's major purpose test," suggesting that the test had its genesis in a discretionary determination made by the Commission. In fact, the "major purpose" test was announced by this Court in *Buckley* and squarely reaffirmed in *MCFL*. We acknowledge that the text of 2 U.S.C. 431(4)(A), the FECA provision that defines the term "political committee," contains no "major purpose" limitation. The question in this case, however, is not whether the FEC has authority to recognize such a limitation on its own initiative, but whether it can be said to have acted "contrary to law" in adhering to the construction of the Act previously announced by this Court.[8]

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[8] The Commission has determined, for the reasons stated at pages 43-46 of our opening brief, that the justifications for the "major purpose" test apply with equal force whether the disbursements that trigger the reporting requirements are independent expenditures or direct contributions. See p. 10, *infra*. That determination might be characterized as a discretionary

2. The court of appeals' decision in this case was based primarily on its conclusion that the "major purpose" test is inapplicable to any organization that makes more than $1,000 in campaign contributions or coordinated expenditures (as opposed to independent expenditures) in a calendar year. See FEC Br. 43; Pet. App. 24a-25a. As we explain in our opening brief (Br. 43-48), that view is incorrect: the justifications for the "major purpose" test apply with equal force whether the disbursements that trigger the reporting requirements are independent expenditures or direct contributions. Respondents defend the court of appeals' judgment, but on a quite different theory. In respondents' view, the "major purpose" test serves to identify those disbursements that are "expenditures" within the meaning of the FECA. They contend (Br. 13 n.7) that any disbursement whose "major purpose" is to influence elections is an "expenditure." In respondents' view, any organization that makes "expenditures" (so defined) in excess of $1,000 in a year is a "political committee," whatever the primary purpose or purposes of the organization as a whole, "except to

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judgment on the part of the Commission, since this Court—while articulating the "major purpose" test in terms that draw no distinction between contributions and independent expenditures—has not explicitly addressed the question. Insofar as the propriety of that judgment is relevant to the Court's disposition of the case, the FEC's view should be accorded deference. See *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (FEC "is precisely the type of agency to which deference should presumptively be afforded").

the extent a [distinct] constitutional exemption * * * applies." *Ibid.*[9]

That view cannot be reconciled with this Court's precedents. In *Buckley*, the Court stated that "[t]o fulfill the purposes of the Act [the words 'political committee'] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. The phrase "major purpose of which" refers neither to expenditures nor to contributions, but to "organizations." Respondents' view of the "major purpose" test is further undermined by the ensuing pages of the *Buckley* opinion, which addressed the term "expenditure" as it applies to independent expenditures made by individuals and by groups other than "political committees." See *id.* at 79-82. The Court construed the term as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (footnote omitted). The Court did not suggest that it was articulating two different tests for an independent expenditure—*i.e.*, one employing the "express advocacy" requirement when applied to individuals and to groups other than political committees, and another employing the "major purpose" test to identify those disbursements counting towards the $1,000 threshold for political committee status. Nor have respondents offered any reason for the formulation of alternative tests.

This Court's decision in *MCFL* reaffirmed that the relevant focus is on the *organization's* major purpose,

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[9] The same rationale was suggested, though not definitively endorsed, by the court of appeals as a possible alternative ground for its decision. See Pet. App. 26a; FEC Br. 39-40.

not the major purpose of an individual disbursement. As our opening brief explains (see Br. 33-37), the *MCFL* plurality deemed it "undisputed" that MCFL was not a "political committee" because "[i]ts central organizational purpose [wa]s issue advocacy," 479 U.S. at 252 n.6, notwithstanding the fact that MCFL had made independent expenditures of nearly $10,000 that "represent[ed] express advocacy of the election of particular candidates." *Id.* at 249-250. The majority observed that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262. *MCFL* makes clear that it is "the organization's major purpose," *ibid.*—not the major purpose of any particular disbursement—that is dispositive of the "political committee" inquiry.

Respondents make little effort to reconcile their position with this Court's articulation, in *Buckley* and *MCFL*, of the criteria for "political committee" status.[10] They rely instead (Br. 15-19) on two lower

[10] Respondents suggest (Br. 21) that the test for "political committee" status articulated by the Court in *MCFL*—*i.e.*, whether the organization's campaign-related spending is "so extensive that the organization's major purpose may be regarded as campaign activity," 479 U.S. at 262—applies only to "small" organizations, and that "wealthy" organizations are governed by the $1,000 ceiling. Nothing in *MCFL* supports that proposition. In explaining why MCFL was not a political committee, the plurality did not allude to the organization's size or wealth, but simply stated that "[i]ts central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *Id.* at 252 n.6. And in describing the circumstances under which MCFL would *become* a political committee, the Court simply invoked the *Buckley* standard—a standard that applies, by its

court decisions—*United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) (*NCFI*), and *American Civil Liberties Union, Inc.* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (*ACLU*), vacated as moot *sub nom. Staats* v. *American Civil Liberties Union, Inc.*, 422 U.S. 1030 (1975)—that were cited by this Court in *Buckley*. See 424 U.S. at 79 n.106 ("At least two lower courts, seeking to avoid questions of unconstitutionality, have construed the disclosure requirements imposed on 'political committees' * * * to be nonapplicable to nonpartisan organizations."). Respondents' approach is flawed in two respects.

First, the lower court decisions on which respondents rely are themselves ambiguous with respect to the question presented here. The Second Circuit's opinion in *NCFI* contains language supporting both approaches to the identification of "political committees." On the one hand, the *NCFI* court stated that it would "construe the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates," 469 F.2d at 1141—language that might

terms, to organizations of all sizes and degrees of prosperity. See *id.* at 262 (citing *Buckley*, 424 U.S. at 79). The Court then observed that if electoral activity came to be the organization's major purpose, MCFL "would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." *Ibid.* It concluded that "there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates." *Ibid.* The clear thrust of the Court's analysis was that the relative infrequency of MCFL's political spending, not its small size or lack of wealth, prevented it from being subject to the Act's political committee provisions.

plausibly be construed as suggesting that the inquiry should focus on the purpose of particular receipts and disbursements.[11] On the other hand, the court observed that under its construction of the FECA, federal officials enforcing the Act "will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." *Id.* at 1142. The court noted as well that "the words of the Act seem to indicate that Congress' concern was primarily with groups organized or at least authorized by a particular candidate and whose principal focus is a specific campaign." *Id.* at 1140. Those passages suggest that the overall character of the organization should be dispositive of the "political committee" question.

In any event, close analysis of the lower court decisions cited by the *Buckley* Court would be appropriate only if such analysis were helpful in resolving an ambiguity in *Buckley* itself. As we explain above, no such ambiguity exists. Rather, the *Buckley* Court stated unequivocally that an organization will be considered a political committee only if the *organization's* major purpose is campaign activity.[12] The

[11] Even that passage, however, supports respondents' position only if the phrase "of which" is taken to refer to individual receipts and disbursements. If the words "contributions" and "expenditures" are understood to refer to the organization's financial activities *in the aggregate*, an inquiry that focused on the major purpose of those "contributions" and "expenditures" would in practical effect be an inquiry into the major purpose of the organization as a whole.

[12] The *Buckley* Court stated that the decisions in *NCFI* and *ACLU* had "construed the disclosure requirements imposed on 'political committees' * * * to be nonapplicable to nonpartisan organizations." 424 U.S. at 79 n.106. This Court evidently

Court reaffirmed that conclusion in *MCFL*. Respondents' apparent view that this Court in *Buckley* misconstrued the lower court decisions in *NCFI* and *ACLU* (but see n. 12, *supra*) provides no justification for the court of appeals' conclusion that the Commission acted "contrary to law" when it applied this Court's "major purpose" test according to its terms.

Moreover, respondents have failed to show how a test focusing on the "major purpose" of a particular disbursement would address the practical and constitutional problems that led to this Court's limiting construction of the Act's political committee provisions. A political committee is required to make comprehensive disclosures of *all* of its receipts and disbursements, even those that bear no direct relation to electoral campaigns. See, *e.g.*, 2 U.S.C. 434(b)(3)(G), 434(b)(6)(B)(v). This Court has construed "political committee" narrowly out of concerns that small amounts of campaign-related expenditures by an organization primarily engaged in issue advocacy could trigger a far-reaching obligation to report all of its non-campaign-related receipts and disbursements. Respondents do not explain how the narrowing con-

interpreted those decisions as focusing on the character of the organization rather than on the character of a particular disbursement. In any event, the Court's recognition that the *NCFI* and *ACLU* courts had "construed the words 'political committee' more narrowly" in order to avoid a constitutional problem, see 424 U.S. at 79, does not mean that the Court itself adopted the *same* narrowing construction. Whatever uncertainty might exist concerning the *Buckley* Court's understanding of the *NCFI* and *ACLU* decisions, the test that the Court *adopted* focuses unambiguously on the primary purpose of the organization.

struction of the term "expenditure" that they advocate would address that problem.[13]

3. Respondents also suggest (Br. 23) that the Commission can mitigate any burden on expressive activity not directly related to elections by "limit[ing] disclosure orders to just the campaign-related activities." That argument is seriously flawed. First, the Commission has no authority to issue "disclosure orders." If the Commission finds probable cause to believe that a violation of the Act has occurred, its only recourse is to attempt to reach a settlement through conciliation and, if unsuccessful, to file a lawsuit in federal district court. 2 U.S.C. 437g(a)(4)-(6); see pp. 5-6, *supra*. Second, respondents' argument is inconsistent with *Buckley* and *MCFL*.

[13] Respondents discuss (Br. 2-3, 20-21, 25) the constitutional exception to 2 U.S.C. 441b's prohibition on corporate independent expenditures recognized in *MCFL* for a small class of nonprofit issue advocacy corporations that do not accept financial support from business corporations or unions (see FEC Br. 9 n.3), and the constitutional exemption from reporting contributors' names recognized in *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), for political groups whose supporters are subject to reprisal. Those holdings involve narrow constitutional exceptions from other statutory requirements, prompted by different policy concerns. The question whether an organization is entitled to an *MCFL* or *Brown* exemption is separate and distinct from the question whether it is a "political committee." Thus, nothing in this Court's decisions suggests that an organization whose major purpose is not campaign-related may nevertheless be deemed a political committee simply because it fails to qualify for an *MCFL* or *Brown* exemption. Conversely, an organization that *does* qualify for an *MCFL* or *Brown* exemption remains subject to the same standard as any other organization—the "major purpose" test—for determining its "political committee" status. See n.10, *supra*.

Those decisions responded to constitutional concerns by announcing a limiting construction of the term "political committee," not by exempting (or authorizing the Commission to exempt) any such committees from the Act's disclosure requirements. Finally, although it might be possible to segregate an organization's campaign-related *disbursements*, political committees are also required, *inter alia*, to disclose all of their *receipts*, whether or not they are specifically earmarked by the donor for campaign activity. See, *e.g.*, 2 U.S.C. 434(b)(3)(G). Respondents' approach therefore would not fully address the difficulties that the "major purpose" test was intended to resolve.[14]

As we note in our opening brief (Br. 48), moreover, the determination that an organization is not a political committee does not serve to "exempt" (Resp. Br. 24) its campaign contributions from the FECA's disclosure requirements. The Act requires the filing of disclosure reports by any person who makes inde-

[14] In addition, unlike lobbying or charitable organizations, political committees are prohibited from receiving contributions exceeding $5,000 from any one person, 2 U.S.C. 441a(a)(1)(C), and cannot accept any contributions at all from corporations or unions, 2 U.S.C. 441b(a). Respondents do not explain how those restrictions would apply to groups that are primarily engaged in non-campaign-related activities, but are nevertheless found (under respondents' theory) to be political committees because their electoral spending exceeds the $1,000 threshold. It is not clear, for example, whether (under respondents' view of the FECA) every donation would be deemed a "contribution" within the meaning of the Act—in which case the ability of such organizations to raise funds would be seriously constrained—or whether some further test would be necessary to distinguish "contributions" from donations intended to support the organization's non-campaign-related activities.

pendent expenditures aggregating more than $250 in a calendar year. 2 U.S.C. 434(c) (1994 & Supp. II 1996); see *MCFL*, 479 U.S. at 252-253 (plurality opinion). Contributions aggregating more than $200 from any person to a candidate or political committee must be reported by the recipient. See 2 U.S.C. 434(b)(3). Although respondents argue that coordinated expenditures could be made in a manner that would make it difficult for the recipient candidates to learn of them, and thus to report them (see Resp. Br. 24), that problem inheres in the statute and exists regardless of whether the contributor is an organization, like AIPAC, or an individual.

* * * * *

For the reasons stated above, and in the opening brief for the petitioner, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL ELECTION COMMISSION,

Petitioner,

vs.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, and ORIN PARKER,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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BRIEF OF THE BRENNAN CENTER FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice is a nonpartisan partnership between the family, friends, and law clerks of Justice William J. Brennan, Jr., and members of the faculty of New York University School of Law. The Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a genuinely

independent center of thought, paying no special deference to his views or opinions. In keeping with Justice Brennan's legendary contributions to the law of American democracy, one of the Center's main programs is its Democracy Program.

This Court has long recognized that compelled disclosure of membership in, or support of, an organization seeking to advance political ends may chill freedom of speech and association. But this Court has also recognized that groups receiving and spending money for lobbying, or to influence the nomination or election of a candidate for federal office, can constitutionally be required to report the sources and recipients of such spending. Similarly, while this Court has long recognized a First Amendment right to raise and spend money to advance political ends, it has also recognized that restrictions may be imposed on the sources and amounts of certain campaign spending.

Where, as here, a group engages in multiple activities, some of which are constitutionally immune from regulation and some of which are covered by the federal lobbying or election laws, a practical and predictable means must be found to protect the legitimate First Amendment rights of such multipurpose groups and their supporters, while imposing appropriate regulation on the group's lobbying and campaign activities.

The Brennan Center submits this brief *amicus curiae* in support of neither party to suggest a pragmatic solution to the practical problem posed by multipurpose groups. *Amicus* believes that it is possible to subject the campaign activities of multipurpose groups to appropriate Federal Election Commission ("FEC") scrutiny, while shielding their non-regulable activities from governmental interference. Because fairness requires that existing multipurpose groups receive adequate notice of the approach *amicus* recommends, we urge the Court to remand these proceedings to the FEC for promulgation of new implementing regulations and for an initial decision on the applicability of the new regulations to the American-Israel Public Affairs Committee ("AIPAC").

The parties have consented to the filing of this brief *amicus curiae*. Pursuant to Rule 37, letters reflecting the parties' consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case poses the difficult question of how best to treat a multipurpose organization that expends substantial resources on activities that are virtually immune from government oversight, such as issue advocacy, while also engaging in electoral activity that is subject to a far greater degree of government regulation.

Existing law requires a rigid "either-or" approach. If a multipurpose organization is deemed to fall on the "electoral activity" side of the line, it is deemed a "political committee," and all activities of the organization, even those wholly unconnected with electoral politics, become subject to three forms of government regulation. First, the Federal Election Campaign Act ("FECA") requires public disclosure of information about the group's receipts and disbursements, including disclosure of the names and addresses of every person who makes even a single $50 contribution to the organization. *See* 2 U.S.C. § 432(c)(2). Second, the organization must forego financial support from labor unions or corporations. *Id.* at § 441b(a). Third, the organization may not accept contributions in excess of $5,000. *Id.* at § 441a(a)(1)(C). If, however, a multipurpose organization is deemed to fall on the non-electoral side of the line, because participation in electoral politics is not a "major purpose" of the organization, it is exempt from many disclosure requirements and all funding restrictions, even as to substantial sums expended to influence the outcome of elections. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

In this case, the FEC ruled that although AIPAC had expended more than $1,000 in apparently inadvertent campaign contributions, it was not subject to regulation as a "political committee" because its "major purpose" was lobbying, not

electoral politics. The FEC noted that only a small portion of AIPAC's $10 million budget was used for electoral activities.

James E. Akins and others concerned with Middle East policy (collectively, "Akins"), alleging a desire to obtain information about AIPAC's funding, challenged the applicability of the "major purpose" test to organizations that exceed the statutory threshold of $1,000 in campaign contributions. The D.C. Circuit declined to apply the "major purpose" test to AIPAC, ruling that the "major purpose" test applied only to multipurpose groups making independent expenditures, not to those making campaign contributions. Accordingly, the court below placed AIPAC on the electoral activity side of the line, triggering public disclosure and loss of funding autonomy for all its activities, whether or not campaign-related.

Amicus maintains that the "either-or" approach to the issue adopted both by the parties and by the court below is fundamentally flawed. The FEC's approach provides multipurpose organizations with a windfall, enabling them to engage in substantial campaign activity without complying with the disclosure and funding rules applicable to everyone else. On the other hand, the all-or-nothing approach urged by Akins and by the court below is unduly harsh, forcing multipurpose organizations and their supporters to gamble the First Amendment rights of an entire organization on whether an insignificant portion of its activity will be deemed to fall on the right side of the obscure line separating electoral from non-electoral conduct.

Amicus believes that multipurpose organizations that fail to qualify for constitutional exemptions under *Brown v. Socialist Workers Party '74 Campaign Committee*, 459 U.S. 87 (1982), or *Massachusetts Citizens for Life*, 479 U.S. 238, should be permitted to establish and maintain strictly segregated funds fully subject to FEC regulation for use in electoral campaigns, while shielding their non-regulable activities from government oversight. Such a nuanced approach is faithful to this Court's precedents and to the structure of the federal election laws. In short, *amicus* believes that we can have both full

enjoyment of First Amendment freedoms and effective scrutiny of electoral spending.

ARGUMENT

I. THE COURT SHOULD REMAND THIS CASE FOR DEVELOPMENT OF NEW REGULATIONS APPLYING THE FEDERAL ELECTION LAWS TO MULTIPURPOSE POLITICAL GROUPS.

A. A Sound Definition of "Political Committee" Must Distinguish Between Political Activity Protected from Regulation and Political Activity Subject to Disclosure and Restrictions on Funding.

This Court has repeatedly affirmed the "vital relationship" between the robust exercise of First Amendment freedoms and the values of privacy. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). In so doing, the Court has recognized that the First Amendment guarantees the right to engage in a wide range of political activities without risking public disclosure. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995) (preparation and distribution of anonymous leaflets opposing a school tax); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (receipt of communist literature); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963) (membership in political organization); *Shelton v. Tucker*, 364 U.S. 479 (1960) (membership in or contributions to organizations of all kinds); *Talley v. California*, 362 U.S. 60 (1960) (anonymous leafleting); *Bates v. Little Rock*, 361 U.S. 516 (1960) (financial support of political organization); *NAACP v. Alabama*, *supra* (membership in political organization); *United States v. Rumely*, 345 U.S. 41 (1953) (purchase of controversial books).

The Court has also recognized, however, that compelling governmental interests in preventing corruption and assuring an informed electorate may justify compelled public disclosure of the sources and amounts of campaign spending and lobbying expenses. *See, e.g., Buckley*, 424 U.S. at 66-68

(upholding disclosure of campaign contributions and expenditures); *United States v. Harriss*, 347 U.S. 612 (1954) (upholding limited disclosure of lobbying activities).[1]

The First Amendment protects not only the right to engage in anonymous political activity but also the right to raise and spend money in support of political ends. *See, e.g., Meyer v. Grant*, 486 U.S. 414 (1988) (invalidating ban on paid petition circulators.); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (invalidating spending ceilings on independent expenditures by political committees); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (solicitation of funds protected by First Amendment); *Buckley*, 424 U.S. at 48 (expenditure of campaign funds protected by First Amendment). But the Court has also recognized that compelling interests associated with maintaining the integrity of the democratic process justify limiting the sources and amounts of certain election spending. *See Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding flat ban on corporate political expenditures); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding ceilings on contributions to multicandidate political committees); *Buckley*, 424 U.S. at 44 (upholding limits on amounts of individual campaign contributions).

When a group engages in only one type of political activity, the Court's complex First Amendment jurisprudence must be parsed to determine whether that activity falls on the

[1] The complex interaction between the Court's anonymous speech cases and its campaign disclosure jurisprudence is illustrated by *McIntyre v. Ohio Elections Comm'n, supra*. In that case, the Court invalidated Ohio's effort to ban anonymous election leaflets. However, if Mrs. McIntyre's leaflet had supported or opposed the election of a candidate for federal office, and if she had expended more than $250 in connection with her leafleting, she would have been obliged to report her activities to the FEC, even if she were free to omit her name from the leaflet itself. *See Buckley*, 424 U.S. at 84 (upholding 2 U.S.C. § 434(c)(1)). And if Mrs McIntyre had collected donations of $200 to finance her leaflets, the identities of the donors would also have been subject to disclosure to the FEC. *See* 2 U.S.C. § 434(c)(2)(C).

regulable or non-regulable side of the line. This case poses the even more difficult question of how to treat multipurpose organizations that engage in both regulable and non-regulable activity.

The trick is to find a test that is neither too permissive nor too harsh. If the Court reaffirms the "major purpose" test suggested by *Buckley* and embraced by the FEC, large multipurpose groups will be empowered to solicit, receive, and expend significant sums to influence the outcome of a federal election, with only limited public disclosure of campaign spending and entirely free from restrictions on the source and amount of contributions to the group. On the other hand, the rigid all-or-nothing test applied by the D.C. Circuit would strip a political organization and its $50 donors of any right to anonymity and would dramatically constrict its sources of funding, if the organization inadvertently spent more than $1,000 on what was subsequently deemed to be a campaign contribution or a coordinated expenditure, even when the vast bulk of the organization's activity qualified for full First Amendment protection from any form of government regulation.

Amicus believes that it is unnecessary to choose between a loophole and a booby trap. Instead, a pragmatic solution exists, under which a multipurpose organization wishing to shield non-campaign activities from regulation could establish and maintain a segregated fund for campaign-related activities. The maintenance of such a segregated fund would insulate an organization's non-campaign activities from government regulation, while subjecting campaign-related activity to appropriate restrictions. *Cf. Regan v. Taxation With Representation*, 461 U.S. 540 (1983). Divorcing campaign from non-campaign activities would also afford such an organization "breathing space," thereby permitting this Court to retreat from the unworkably narrow prophylactic definition of campaign speech set forth in *Buckley*, 424 U.S. at 80. *See infra* section I.C.

B. The Interpretations of the Term "Political Committee" Advanced by the Parties and by the Court Below Fail to Provide a Narrowly Tailored Approach to the Problem.

1. The FEC's Approach Opens an Unnecessary Loophole, Inviting Avoidance of Legitimate Regulation of the Electoral Process.

In its petition for certiorari in this case, the FEC correctly describes current law. Under *Buckley*, an organization that is not controlled by a candidate cannot be deemed a "political committee" — even if it receives, spends, or contributes more than the statutory minimum of $1,000 in connection with a federal election — unless the organization's "major purpose" is the nomination or election of a candidate. 424 U.S. at 79; *see also Massachusetts Citizens for Life,* 479 U.S. at 252 n.6. Thus, under existing law, whether or not a multipurpose organization will be deemed a political committee will depend on how its campaign-related activities compare in size and importance to its other activities.

The language of *Buckley* and this Court's application of the "major purpose" test in *Massachusetts Citizens for Life,* strongly support the FEC's determination that, under current law, AIPAC is not a political committee. The FEC found, and Akins does not appear to contest, that AIPAC's "campaign-related activities were only a small portion of its overall activities and not its major purpose." *Akins v. FEC*, 101 F.3d 731, 734 (D.C. Cir. 1997) (*en banc*), *cert. granted*, 117 S. Ct. 2451 (1997). Thus, because "AIPAC is primarily a lobbying organization interested in promoting U.S.-Israel relations," *Akins v. FEC*, 66 F.3d 348, 350 (D.C. Cir. 1995), *rev'd on other grounds*, 101 F.3d 731, it does not fall within *Buckley*'s definition of a "political committee."

The FEC's determination is, nevertheless, extremely troubling. As the D.C. Circuit noted, the FEC's application of the "major purpose" doctrine permits AIPAC to shield campaign-related disbursements from public scrutiny, even though the

amounts exceed the figure deemed by Congress to create a risk of corruption. The interest in public disclosure of AIPAC's campaign-related spending is no less weighty than it would be if the identical payments accounted for the bulk of the organization's budget. Indeed, if AIPAC were smaller, the compelling interest in public disclosure might well require it to disclose its campaign-related spending because electoral politics would represent a proportionately larger part of its activities. It simply makes no sense to treat identical amounts of electoral spending differently depending upon the size of the spender. Nor is it fair to allow AIPAC to receive funds from sources and in amounts that are denied to other groups engaged in identical electoral activity merely because AIPAC's substantial size renders the payments relatively small in comparison with the rest of AIPAC's budget.[2]

2. The D.C. Circuit's Approach Unnecessarily Abridges First Amendment Rights and Opens Another Loophole.

The D.C. Circuit argues that the "major purpose" test should apply only in settings where a multipurpose group makes independent expenditures on behalf of a candidate for federal office, as opposed to contributions or coordinated expenditures. Because AIPAC was found to have made more than $1,000 in contributions (albeit inadvertently), the Circuit ruled that the entire group must be treated as a "political committee," with a consequent loss of anonymity for all of its $50 contributors and the imposition of significant restrictions on the source and amount of its funding. The Circuit's approach is both unduly harsh to multipurpose groups that inadvertently stray over the "campaign contribution" line and unduly generous to multipurpose groups that make substantial

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[2]Such favorable treatment of AIPAC is particularly inappropriate since its major purpose is not to engage in a non-regulable activity like issue advocacy, but rather to lobby, an activity that itself is subject to substantial regulation.

independent expenditures in connection with a federal election.

The Circuit's test is unduly harsh because it places the critical First Amendment rights of an entire organization and its supporters in retroactive jeopardy merely because an official of the organization inadvertently crosses one of the ill-defined lines between a campaign expenditure and a campaign contribution, on the one hand, and between issue advocacy and campaign speech, on the other. One of the unfortunate consequences of this Court's decision in *Buckley* is the inordinate importance attached to labeling campaign spending as an expenditure or a contribution. *Amicus* believes that the effort in *Buckley* to invest the distinction between campaign contributions and campaign expenditures with enormous constitutional significance is analytically unpersuasive and practically unworkable. Whatever its intrinsic merit, however, the distinction is often difficult to apply. *See Colorado Republican Federal Campaign Committee v. FEC*, 116 S. Ct. 2309 (1996).

The D.C. Circuit's approach thus forces a multipurpose group to wend its way through a definitional minefield, with a wrong step severely limiting the organization's ability to engage in anonymous speech and imposing significant restrictions on the group's sources and levels of financial support. Where critical First Amendment rights are at stake, such a version of organizational "Russian roulette" is unacceptable.

Moreover, the Circuit's solution simply reproduces the problem with the FEC's test within the context of expenditures. Under the Circuit's approach, large multipurpose organizations would be encouraged to make substantial campaign expenditures, free from the disclosure rules applicable to smaller groups whose identical expenditures would constitute a larger percentage of their budget and would thus be regarded as their "major purpose." Large multipurpose organizations bent on influencing an election could also receive money from sources and in amounts that would be illegal for

small groups whose identical expenditures pushed them over the "major purpose" line.

Akins' variant on the "major purpose" test, proffered in opposition to the petition for certiorari, suffers from the same all-or-nothing flaw that plagues the D.C. Circuit's approach. Akins argues that if more than $1,000 is disbursed in connection with a federal campaign, the organization must be deemed to be a political committee, unless it qualifies for an exemption under *Brown*, 459 U.S. 87, or *Massachusetts Citizens for Life*, 479 U.S. 238. But such an approach leaves those multipurpose organizations that cannot qualify for such an exemption at constant risk of inadvertent slippage from issue advocacy to campaign activity. Moreover, Akins' suggestion that the FEC be vested with unconstrained discretion to separate the regulable and non-regulable aspects of a multipurpose organization's activities raises more First Amendment problems than it solves.

C. The First Amendment Challenge Posed by the Campaign Activities of Multipurpose Organizations Has a Pragmatic Solution Consistent With Congressional Intent and this Court's Constitutional Precedents.

As *amicus* has noted, characterizing a multipurpose organization as a "political committee" has at least three real-world consequences. First, the organization must report all receipts and expenditures to the FEC, subjecting even its $50 donors to public scrutiny. Second, the organization may no longer accept funds from corporations or labor unions. Third, the organization must operate with a ceiling on the donations it receives. While developing a workable approach to multipurpose organizations is complicated by the fact that First Amendment doctrine varies widely depending upon whether disclosure, expenditures, or contributions are at issue, *amicus* believes that a workable approach to multipurpose organizations is suggested by the Court's precedents and Congress' structural innovations.

First, whether or not a multipurpose organization falls within the definition of a "political committee," this Court has ruled that it must be exempt from disclosure requirements upon a showing that its political program is highly controversial, subjecting any identified supporters to a real possibility of persecution. *See Brown*, 459 U.S. at 101-02.[3] Thus, controversial multipurpose political organizations may remove themselves from FEC scrutiny upon a proper showing.

Second, even if an organization fails to qualify for a *Brown* exemption, this Court has recognized a "small entities" exemption for "issue advocacy" organizations that do not have as a "major purpose" the influencing of federal elections. *See Massachusetts Citizens for Life*, 479 U.S. at 254. In order to qualify for such a "small entity" exemption, an organization must be formed for political, not business, purposes; it may not have shareholders or other affiliated persons with a claim on its earnings; and it may not be established by or receive support from corporations or labor unions. Under *Massachusetts Citizens for Life*, the entity must make only minimal or occasional expenditures in support of candidates and no contributions to candidates. As applied to such small, issue advocacy groups, the concept of "major purpose" works well to prevent the FECA from unconstitutionally destroying an organization's right to anonymity and unduly restricting its funding base.

Third, if an organization fails to qualify for a "controversial organization" or a "small entity" exemption under *Brown* or *Massachusetts Citizens for Life*, this Court has recognized that the establishment of a separate but affiliated organization may permit a multipurpose group to shield one type of

[3] In *Buckley*, the Court rejected a facial effort to exempt such controversial organizations, and minor parties generally, from contribution restrictions. *See Buckley*, 424 U.S. at 33-34. The *Buckley* Court held open the possibility that controversial organizations could obtain "as applied" exemptions from disclosure requirements based on a showing that the requirements would subject them to "threats, harassment, or reprisals." *Id.* at 74.

activity from regulation applicable to another. *Cf. Regan*, 461 U.S. 540. While the FECA does not appear to provide explicitly for the use of separate but affiliated organizations, the ability to segregate regulable from non-regulable political activities is required by the First Amendment. *See FEC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (finding a First Amendment violation when the option of segregating activities was not available).

Fourth, if a multipurpose organization finds it unduly burdensome to create a separate but affiliated entity, Congress' recognition that "separate segregated funds" may be used to facilitate campaign activity that could not otherwise occur provides a structural model for separating regulable from non-regulable activities. *See* 2 U.S.C. § 441b(b)(2)(C); *FEC v. National Right to Work Committee*, 459 U.S. 197, 201 (1982). Thus, if a multipurpose organization establishes and maintains a carefully segregated fund for use in campaign contexts, the organization could comply fully with disclosure, source, and amount limitations, while shielding its non-regulable activities from unconstitutional government regulation. Of course, such a segregated fund must bear its full share of all fixed expenses. But, assuming that appropriate accounting principles are maintained, the use of a segregated fund would appear to provide a vehicle to permit appropriate regulation of the electoral process, while shielding issue advocacy from unconstitutional regulation.

If a multipurpose organization fails to qualify for a constitutional exemption, and fails to organize its activities to separate regulable campaign activities from non-regulable issue advocacy activities, it would forfeit its ability to engage in anonymous political activity and would subject its financing to FEC regulation. Thus, while AIPAC may well not be obliged under the prevailing "major purpose" test to disclose contributors or to respect restrictions on fund-raising imposed by the FECA, AIPAC might well be subject to disclosure and funding restrictions under the new approach proposed by *amicus*. *Amicus* therefore urges the Court to remand this proceeding to the FEC for the consideration of prospective

regulations that deal effectively with the campaign activities of multipurpose organizations by providing for separate organizations or segregated funds.

Adopting regulations permitting the use of segregated funds and clarifying the availability of a "small entity" exemption would also permit this Court to ease the unrealistically narrow definition of campaign speech set forth in *Buckley*. Concerned with the possibility that issue advocacy organizations might unwittingly find themselves labeled as campaign organizations, with the consequent loss of privacy and funding autonomy, this Court adopted an extremely narrow definition of campaign speech that covered only those communications that "expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. Unfortunately, such a restrictive definition has spawned a serious loophole, permitting groups to expend significant funds in an obvious effort to affect the outcome of federal elections, but to escape all regulation by avoiding the use of so-called "magic words" "expressly" advocating the election or defeat of a candidate. Once an organization is given the "safe harbor" of a segregated campaign fund, however, it would no longer be necessary to adopt a prophylactically narrow definition of campaign speech to protect the entire organization. The FEC would then be free to adopt a realistic definition of campaign speech geared to a speaker's obvious intent to affect the outcome of a particular election.

II. THIS COURT SHOULD AFFIRM AKINS' STANDING TO CHALLENGE THE FEC'S EXEMPTION OF AIPAC FROM REGULATION AS A POLITICAL COMMITTEE.

Akins must show that he satisfies the threshold requirements for standing under Article III of the federal Constitution and that he conforms to principles of prudential standing. To fulfill the requirement of Article III that there be a "case" or "controversy" for adjudication, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested

relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Prudential standing principles are judicially self-imposed limits on the exercise of federal jurisdiction, which can be modified or abrogated by Congress. *See Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997). The D.C. Circuit correctly concluded that Akins had met the standards for both constitutional and prudential standing.

Congress's clear intent in enacting the FECA was (among other things) to provide public access to information that political committees were required to report. The Act specifically mandates that all reports filed with the FEC, the Clerk of the House of Representatives, the Secretary of the Senate, and State officers who maintain election campaign reports be made available for public inspection within 48 hours of receipt. *See* 2 U.S.C. §§ 432(g)(5), 438(a)(4), 439(b)(3). *Buckley* confirmed that two of the compelling governmental interests served by the FECA's reporting and disclosure requirements were to "provide[] the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office," and to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." 424 U.S. at 66-67 (footnote and citation omitted).

The structure of the FECA makes it clear that Congress intended to give all persons a right to obtain reportable information and not merely to impose on political committees a duty to report enforceable by the FEC. The FECA authorizes "any person" who believes that the Act's reporting (or other) requirements have been violated to file a complaint with the FEC. 2 U.S.C. § 437g(a)(1). If the FEC does not timely act upon the complaint or dismisses it, the person may petition the District Court for the District of Columbia for further review. *Id.* § 437g(a)(8)(A).

Akins' allegations that he has been deprived of information to which he has a right under the FECA and that could affect

his decision-making as a voter and otherwise politically active citizen thus establish the requisite injury in fact. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'") (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). "The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen [the] asserted injury . . . ." *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449-50 (1989). The injury asserted here is "fairly traceable" to the FEC because it is the direct result of the agency's determination that AIPAC is not a political committee and is thus not required to disclose its receipts and disbursements. And the injury is redressable by the requested relief because a judicial determination that AIPAC is a political committee would subject the organization to the FECA's registration and reporting requirements and ultimately provide Akins with the information he seeks. Akins has therefore met the requirements for Article III standing.

As to Akins' prudential standing, Congress has defined a wide zone of interests in enacting the FECA. Section 437g(a)(8)(A) provides:

> Any party aggrieved by an order of the Commission dismissing a complaint filed by such party . . . , or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

The petition must be filed within 60 days from the date of dismissal. 2 U.S.C. § 437g(a)(8)(B). Because "any person" may file the initial complaint with the FEC, *see id.* § 437g(a)(1), Congress has effectively widened the FECA's "zone of interests" to include "any person" that satisfies the constitutional minimum for standing, provided that the person exhausts administrative remedies (by filing a complaint with the FEC and waiting 120 days or until the complaint is

dismissed) and petitions the District Court within 60 days. The statutory intent "to permit enforcement by everyman," *Bennett*, 117 S. Ct at 1163, is further confirmed by the provision permitting the complainant to sue the violator directly, should the FEC fail to act on a District Court order to commence enforcement within 30 days. *See* 2 U.S.C. § 437g(a)(8)(C). Accordingly, Akins should be found to have prudential standing.

An additional prudential consideration calls for the recognition of broad standing to challenge the actions of the FEC. From its inception, the structure of the FEC has been intentionally designed to represent the interests of the two major political parties. While such careful political fine-tuning may be appropriate in an agency with jurisdiction over the electoral process, it poses the danger that the interests of the established political parties will play an inappropriately significant role in the FEC's activities. Recognizing Congress' desire to accord broad standing to challenge FEC actions would provide an important check on the potential for abuse.

CONCLUSION

The decision below should be vacated and remanded to the FEC with instructions to adopt regulations permitting multi-purpose organizations to utilize segregated funds or separate but affiliated organizations to distinguish between regulable and non-regulable activities. The issue of AIPAC's compliance with the FECA should be reconsidered in light of any new regulations adopted by the FEC.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE IN SUPPORT OF NEITHER PARTY

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The American Israel Public Affairs Committee ("AIPAC") is a nonprofit, tax-exempt (under 26 U.S.C. § 501(c)(4)) membership corporation with approximately 50,000 members nationwide in 1997. Its purpose is to maintain and improve friendship and goodwill between the United States and Israel.*

Respondents, six individuals who actively oppose AIPAC's efforts to strengthen U.S.-Israel relations, filed an administrative complaint against AIPAC with the Federal Election Commission ("FEC" or the "Commission") on January 9, 1989. They alleged numerous violations of the Federal Election Campaign

*This brief was not authored in whole or in part by counsel for any party, and no person other than AIPAC, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Act of 1971 as amended ("FECA" or the "Act"), 2 U.S.C. §§ 431 *et seq.*, by AIPAC and others. The Commission dismissed respondents' complaint after a lengthy investigation. Respondents then initiated this lawsuit against the Commission.

This case has proceeded through the courts on the premise that the alleged conduct giving rise to this lawsuit -- AIPAC's election-related communications with its own members -- would be subject to regulation under FECA if (as the court below held) the "major purpose" test applied by the Commission is invalid. That crucial premise, however, is incorrect. As the organization whose alleged conduct is at issue in these proceedings, AIPAC has a direct interest in ensuring that a complete and accurate portrayal of the facts and issues is presented to the Court for its consideration.

Regardless of the validity or invalidity of the "major purpose" test, FECA does not apply to AIPAC's alleged conduct. That conduct consists entirely of communications by AIPAC to its own members, and FECA expressly exempts such communications from the category of conduct that can qualify an organization as a regulated "political committee." The Commission determined that AIPAC's members were not "members" within the meaning of this statutory exemption, but developments in the law since the issuance of that decision confirm the incorrectness of the Commission's ruling in that regard. Under the current state of the law, therefore, it is clear that AIPAC could not be found to have violated the Act even if the "major purpose" test were to be invalidated by this Court. That fact deprives the first question presented in the petition of any significance with respect to the parties and case actually before the Court, and demonstrates that the proper disposition of this case would be to vacate the judgment below and remand with directions to dismiss

the complaint or, in the alternative, to reconsider the antecedent membership issue.

AIPAC has a vital interest in ensuring that the Court's resolution of this case does not inadvertently cast doubt upon AIPAC's proper status as a membership organization constitutionally and statutorily entitled to communicate with its members about election-related matters and other subjects of interest and concern to them. Accordingly, AIPAC has respectfully submitted this *amicus curiae* brief to emphasize its status as a membership organization and to reveal the resulting absence of any concrete dispute over the validity of the "major purpose" test.

The Commission and respondents have consented to the filing of this *amicus* brief.

STATEMENT

I. Background

AIPAC is a tax-exempt, non-stock, non-profit membership corporation incorporated under the laws of the District of Columbia, and has a single class of members. Pet. App. 78a; FEC General Counsel's Brief ("G.C. Br.") 81;[1] D.C. Code Ann. §§ 29-512 through 29-514. AIPAC is dedicated to "'maintain[ing] and further[ing] the friendship between the United States and Israel and to strengthen[ing] and promot[ing] the mutual ideals and interests of both nations, *in accordance with the views of its members*.'" G.C. Br. 8, 77

[1] The General Counsel's Brief was incorporated by reference into the General Counsel's Report, which in turn formed the basis for the Commission's determination in this matter. *See* General Counsel's Report ("G.C. Rep.") 3; Pet. App. 98a. The General Counsel's Brief and Report are reproduced at pp. 88-195 and pp. 196-223, respectively, of the Joint Appendix filed by the parties in the court of appeals.

(emphasis added by General Counsel) (quoting AIPAC's Bylaws § 1(a)); Pet. App. 78a.

AIPAC's bylaws provide that individuals may become AIPAC members by completing a membership application, form, or card and by paying annual dues as set by AIPAC's Executive Committee. G.C. Br. 77-79. AIPAC's dues are $50 per year ($15 for students), except that the chief lay officers of certain major Jewish organizations may join without paying dues. G.C. Br. 78. "Membership must be renewed yearly [through the payment of dues]. AIPAC sends out five notices of late payment and then drops the individual from AIPAC's membership roles if payment is not made." G.C. Br. 80. AIPAC had 37,104 members in 1989, excluding student members, and received nearly $10 million in dues and contributions from its members in that year. G.C. Br. 80-81 n.30.[2]

AIPAC has a 190-member Executive Committee that oversees the affairs of the organization. G.C. Br. 85. AIPAC's officers and most members of the Executive Committee are nominated by the Nominating Committee and elected by majority vote of the Executive Committee to one-year terms (for Executive Committee members) or two-year terms (for officers). G.C. Br. 85-86. No member of the Executive Committee may serve more than 5 consecutive terms, and officers may not serve more than 3 consecutive terms. G.C. Br. 86, 89. Only AIPAC members are eligible to serve as officers or Executive Committee members.

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[2] Except as otherwise indicated, the facts described in this brief are based on the administrative record, and do not reflect developments (including organizational changes within AIPAC) that have taken place since the completion of the administrative proceeding.

AIPAC Bylaws, § 1(c)(1), *reproduced at* Admin. Rec. 1603.

The Nominating Committee consists of 7 AIPAC members appointed by AIPAC's President and other officers. G.C. Br. 87. A majority of the Nominating Committee may be made up of AIPAC members who do not sit on the Executive Committee. G.C. Br. 87. Any AIPAC member may propose or submit to AIPAC's President or other officers the name of any other AIPAC member for consideration for a position on the Nominating Committee. G.C. Br. 87. Nominations for the Executive Committee and other AIPAC offices are based upon an individual member's commitment to AIPAC. G.C. Br. 88. There is substantial lobbying on the part of AIPAC members for such positions, and many of AIPAC's Executive Committee members and officers "have essentially 'risen through the ranks.'" G.C. Br. 88-89.

AIPAC has "an array of regional boards, standing committees, state chairs, and key contacts" that offer individual members "an opportunity to participate in AIPAC's affairs." G.C. Rep. 19. Local committees of AIPAC members across the country assist AIPAC's "local and national staff in planning and implementing fundraising events, educational meetings, caucuses and workshops." G.C. Br. 91. Moreover, AIPAC's regional governing bodies (which have hundreds of AIPAC-member participants) meet frequently to hear reports "from AIPAC's regional and national staff and to review operations and activities of the regional office." G.C. Br. 91.

AIPAC members are entitled to various benefits of membership, including notification of AIPAC events and the opportunity to participate in AIPAC activities like receptions with AIPAC speakers, educational seminars, and regional political workshops. G.C. Br.

82-83. Members are also entitled to receive various AIPAC publications. G.C. Br. 83.

All AIPAC members are entitled to "attend and participate in its annual Policy Conference," where AIPAC's "policy for the next year is set." G.C. Rep. 19; G.C. Br. 9. All such members "have the opportunity to debate and vote on the Policy Statement," which plays an important role in governing AIPAC's activities for the next year and is regularly consulted by the organization's Executive Committee, officers, and staff. G.C. Rep. 19; G.C. Br. 85, 92. Individual members "also have the right to attend meetings of the Executive Committee, the National Council, and all standing and special committees." G.C. Rep. 19. In addition, they "may circulate and submit petitions for nomination to any AIPAC office including the Nominating Committee and the Executive Committee." G.C. Rep. 19.

AIPAC does not rate or endorse candidates for electoral office, engage in campaign fundraising, or establish, maintain, or control any political action committee. G.C. Br. 12-15, 17-21, 24-26 & n.9, 32. It does disseminate (to its members only) information about upcoming campaigns for federal and other public office, including candidate position papers, voting records, publicly available polling data, and summaries of financial disclosure information. G.C. Br. 8. This information is usually distributed to AIPAC members in summaries known as campaign updates. G.C. Br. 8. More generally, AIPAC endeavors to "educate AIPAC members 'about the electoral process and its impact on U.S.-Israel relations.'" G.C. Br. 30. AIPAC "'scrupulously limit[s] any and all communications that might remotely be considered partisan to those individuals who satisfy the requirements for membership in AIPAC, as defined by AIPAC's bylaws.'" G.C. Br. 96.

II. Administrative Proceedings

In January 1989, respondents filed a complaint with the Commission alleging numerous violations of FECA by AIPAC and by 27 Jewish political action committees. Pet. App. 77a-78a. The complaint alleged that (1) AIPAC is a "political committee" subject to FECA's registration and reporting requirements, 2 U.S.C. §§ 433 and 434; (2) AIPAC and the 27 political action committees were affiliated and therefore subject to combined reporting and expenditure limitations; (3) AIPAC failed to disclose election-related activity to the Commission; and (4) AIPAC made illegal campaign expenditures. Pet. App. 78a-79a.

The Commission rejected respondents' affiliation claim, finding "no reason to believe" that AIPAC was affiliated with the 27 political action committees. Pet. App. 79a-80a. Moreover, after an extensive investigation of respondents' allegations that AIPAC had engaged in impermissible election-related conduct, the Commission's General Counsel found that many of respondents' claims of election-related conduct by AIPAC were totally unsupported by credible evidence or were fully rebutted by AIPAC's detailed factual showings. G.C. Br. 62. With respect to the remaining allegations, the General Counsel determined that "[a]ll of these activities consist[] solely of communications to persons AIPAC considers its 'members.' Thus, whether or not these activities violate [FECA] depends on whether or not the persons AIPAC considers its 'members' qualify as members under the Act." G.C. Br. 65; *see also* G.C. Br. 21.

Finding that "most individuals who join AIPAC pay a minimum amount of $50 in annual dues" (G.C. Br. 97), the General Counsel concluded that (with the exception of the 45 chief lay officers of Jewish organizations who also serve on AIPAC's Executive Commit-

tee) "the apparent obligation of individuals to pay a minimum amount of dues to AIPAC on an annual basis constitutes a significant financial attachment." G.C. Br. 98. Moreover, the General Counsel found that "most individuals do take some affirmative steps to join AIPAC" and that "[w]ith the payment of dues, individuals are entitled to certain rights and privileges in AIPAC." G.C. Br. 99.

The General Counsel nevertheless concluded that AIPAC's members (other than the members of the Executive Committee) did not qualify as "members" under the Act because they did not have "sufficient rights in the governance of the organization." G.C. Br. 99-101. While conceding that even under the Commission's then-view of the law "it [wa]s a close question whether persons who belong to AIPAC qualify as members for purposes of the Act" (G.C. Rep. 19), the General Counsel reasoned that "the membership at large has no right or opportunity to elect persons to the Executive Committee or to elect AIPAC's officers. It is the absence of this right in the membership at large that we find most troublesome." G.C. Rep. 20-21. In the General Counsel's view, the absence of the right to elect AIPAC's leaders was dispositive, because "to treat all 37,000+ [AIPAC members] as members of AIPAC for purposes of the Act would indicate that the Commission is no longer using voting rights as a bright line test to establish membership under the Act." G.C. Rep. 21.

Based on his determination that AIPAC's members were not "members" within the meaning of FECA, the General Counsel concluded that AIPAC had made election-related communications to persons who were not "members" and therefore had made impermissible indirect in-kind corporate contributions under 2 U.S.C. § 441b, which prohibits any corporation from making contributions in connection with a federal election

(other than communications with the corporation's members or stockholders). G.C. Br. 2, 102. Accordingly, the General Counsel recommended that the Commission find probable cause to believe that AIPAC had violated Section 441b. G.C. Rep. 27; G.C. Br. 2, 102; Pet. App. 80a. The General Counsel recommended that the Commission find no probable cause to believe that AIPAC was a political committee subject to the registration and reporting requirements of 2 U.S.C. §§ 433 and 434, however, because "AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization." G.C. Br. 2-3.

The Commission adopted the General Counsel's recommendations, concluding that AIPAC was not a "political committee" but finding probable cause to believe that AIPAC had violated 2 U.S.C. § 441b. Pet. App. 95a-96a. Noting that the General Counsel's analysis of the membership issue "principally cited the fact that group members at issue here had no right to vote for the governing body (the Executive Committee) of AIPAC," the Commission "agreed with the General Counsel's conclusion that AIPAC did not meet the Commission's membership criteria." Pet. App. 97a-98a. Finding that "the AIPAC situation presented a close question," however, and that "the Commission should clarify its membership definition before imposing penalties in close cases such as this," the Commission declined to take any enforcement action with respect to the Section 441b finding. *Id.* at 98a.[3]

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[3] After the Commission issued its final order resolving the administrative proceeding, AIPAC revised its organizational structure. As part of that organizational change, all AIPAC members now have the right to vote for a member of AIPAC's governing board. Thus, even under the standards

III. Judicial Proceedings

Respondents brought suit in the United States District Court for the District of Columbia seeking judicial review of the Commission's determination that AIPAC was not a "political committee" subject to the registration and reporting requirements of FECA. Pet. App. 81a. The district court granted summary judgment for the Commission, concluding that the Commission had acted reasonably in applying the "major purpose" test. Pet. App. 77a-93a.

A panel of the court of appeals affirmed, with Judge Silberman dissenting in part. Pet. App. 41a-74a. The majority applied circuit precedent to conclude that respondents had "informational standing" to challenge the Commission's determination, and held that the "major purpose" test was a valid interpretation of FECA and that the Commission correctly applied that test in this case.

On rehearing in banc, the court of appeals reversed and remanded, with two Judges dissenting. Pet. App. 1a-40a. The majority held that respondents had standing to seek judicial review and that the "major purpose" test was invalid. *Id.* at 1a-30a. In a dissenting opinion, Judge Sentelle (joined by Judge Henderson) concluded that respondents lacked standing to challenge the Commission's determination. The dissent explained that respondents had suffered no concrete injury as a result of the Commission's decision and could assert nothing more than a generalized grievance regarding the manner in which the Commis-

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applied by the Commission in the administrative proceeding, all of AIPAC's members would qualify as "members" under the Act.

sion had chosen to exercise its enforcement authority. *Id.* at 30a-40a.

SUMMARY OF ARGUMENT

The first question presented in the petition and accepted for review by this Court -- to wit, the validity *vel non* of the "major purpose" test -- need not and should not be resolved in this case. That question is one of constitutional dimension that would require the Court to determine whether the government's interest in compelled disclosure of contributor and expenditure information from organizations primarily involved in issue advocacy is sufficiently compelling to outweigh the serious First Amendment concerns raised by such disclosure in circumstances where a small proportion of the organization's activities involves "coordinated" campaign expenditures or "contributions" to a political candidate.

Resolution of that weighty constitutional issue should be avoided because a logically antecedent -- and, indeed, dispositive -- issue in this case is the question whether AIPAC's internal communications to its members are "expenditures" for purposes of FECA -- a question that turns on whether AIPAC's members qualify as "members" within the meaning of the Act. The Commission erroneously resolved that antecedent membership issue against AIPAC in 1992, but subsequent changes in the law make clear that even the Commission no longer adheres to the view of the law it applied to AIPAC. As a result, the validity of the "major purpose" test is not properly before the Court, because the resolution of that question would not affect the rights of the parties in this case. The proper course is therefore to vacate the judgment below with directions that respondents' complaint be dismissed or that the case be remanded to the Commission for a determination that AIPAC's members are "members" within

the meaning of FECA and that AIPAC's communications with those individuals regarding election-related matters are immune from government regulation.

ARGUMENT

I. THE VALIDITY OF THE "MAJOR PURPOSE" TEST IS NOT PROPERLY AT ISSUE IN THIS CASE

The first question presented in the petition is whether the court of appeals erred in rejecting the Commission's reliance on the "major purpose" test as a basis for concluding that AIPAC is not a "political committee" under FECA. That question is legally irrelevant in this case, however, if AIPAC's members qualify as "members" under FECA. That is so because the Act's definition of "political committee" is not even arguably triggered by an organization's expenditures aimed solely at communicating with its members, and thus there is no cause to consider the validity of the "major purpose" test in those circumstances. As discussed below, the Commission's determination that AIPAC's members are not "members" under the Act has been overridden by intervening legal developments, and accordingly there is no basis for addressing the "major purpose" test in this case.

A. The "Major Purpose" Test Is Not Implicated In This Case If AIPAC's Members Qualify As "Members" Within The Meaning Of FECA

FECA defines a "political committee" as "any committee, club, association, or other group of persons which . . . makes *expenditures* aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A) (emphasis added). Thus, regardless of the validity of the "major purpose" test, AIPAC cannot be a "political committee" if it did not make "expenditures" within the meaning of the Act.

FECA defines "expenditures" to include any payments "made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The Act expressly excludes from the category of "expenditures," however, "any communication by any membership organization or corporation to its members." 2 U.S.C. § 431(9)(B)(iii); *see also* 11 C.F.R. §§ 100.8(b)(4), 114.3(a)(2).[4] To the extent, therefore, that AIPAC's challenged conduct involved communications by a membership corporation to its members, AIPAC did not make "expenditures" within the meaning of FECA.

It is clear that the alleged AIPAC conduct found to constitute "expenditures" by the Commission involved nothing more than communications by AIPAC to individuals who constitute AIPAC members in accordance with the organization's bylaws. Indeed, the General Counsel expressly found that "[a]ll of these [challenged] activities consist[] solely of communications to persons AIPAC considers its 'members.' Thus, whether or not these activities violate [FECA] depends on whether or not the persons AIPAC considers its 'members' qualify as members under the Act." G.C. Br. 65.

As the Commission conceded in its petition for certiorari, therefore, "[e]ven under the court of appeals' view of the statute, any finding that AIPAC is in viola-

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[4] Similarly, although FECA prohibits any corporation from making contributions or expenditures in connection with a federal election, communications by membership corporations to their members are exempt from this prohibition. 2 U.S.C. § 441b(b)(2); 11 C.F.R. §§ 114.1(j), 114.3(a)(2).

tion of the FECA provisions governing 'political committees' would depend upon the antecedent determination that the communications at issue are properly characterized as contributions -- *i.e.*, that they were sent to persons other than AIPAC's own members." Pet. 27 n.9. The membership issue is logically antecedent to the "major purpose" question presented in the petition and, if resolved in favor of AIPAC, would deprive the latter question of any possible significance in this case.

B. The Commission's Resolution Of The Antecedent Membership Question Has Been Superseded By An Intervening Change In The Law

The Commission found that AIPAC's members-at-large did not qualify as "members" within the meaning of FECA. Pet. App. 98a. The dispositive factor relied upon by the Commission in reaching this conclusion was the fact that AIPAC's members "had no right to vote for the governing body (the Executive Committee) of AIPAC." *Id.* Indeed, the Commission adopted the General Counsel's conclusion in this regard (*id.*), and the General Counsel made clear that his conclusion was in turn based on the Commission's use of "*voting rights as a bright line test to establish membership under the Act*." G.C. Rep. 21 (emphasis added).

The "bright line" voting rights test that the Commission applied to AIPAC was not set forth in the Commission's regulations at that time, and the Commission recognized in its statement of reasons that it "should clarify its membership definition before imposing penalties in close cases such as this." Pet. App. 98a. Accordingly, the Commission subsequently amended its regulations to codify its bright-line voting rights test for membership under FECA. 58 Fed. Reg. 45770 (Aug. 30, 1993). The new rule generally limited the category of "members" to those dues-paying members of an organization who "are entitled to vote directly either for at least one member who has fully participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association." 11 C.F.R. § 114.1(e)(2)(ii). According to the Commission, this bright-line voting rights test was "consistent with past Commission advisory opinions and enforcement actions" addressing the membership issue. 58 Fed. Reg. at 45772.

In *Chamber of Commerce of U.S. v. Federal Election Comm'n*, 69 F.3d 600, 601 (D.C. Cir. 1995), *clarified on denial of reh'g*, 76 F.3d 1234 (D.C. Cir. 1996), the District of Columbia Circuit held that the Commission's bright-line voting rights requirement was invalid. The court explained that the First Amendment protects the right of organizations to communicate with their members and that "too restrictive a definition of member -- as the Commission's here -- would burden that right." *Id.* at 605 (citing *United States v. CIO*, 335 U.S. 106, 121 (1948)).

The court of appeals also reasoned that the Commission's regulation was inconsistent with this Court's decision in *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197 (1982) (*"NRWC"*), which suggested that a "relatively enduring and independently significant financial *or* organizational attachment" is sufficient for membership status under the Act. 459 U.S. 204 (emphasis added). As the court of appeals explained, "by referring to a financial attachment, th[is] Court presumably implied something similar to dues." 69 F.3d at 605. The Commission's regulation, by contrast, expressly provided that the payment of dues was *not* sufficient in itself to confer membership status. *Id.*; *see* 11 C.F.R. § 114.1(e)(2)

(ii) (requiring payment of dues *plus* voting rights). Thus, the court of appeals concluded, the Commission had improperly read in the conjunctive this Court's disjunctive test for membership -- "financial *or* organizational attachment." *See* 69 F.3d at 605.

Moreover, the court of appeals held that the Commission's bright-line voting rights requirement improperly "ignore[d] other indications of organizational attachment." 69 F.3d at 605. Rejecting the Commission's single-minded focus on voting rights, the court noted that this Court had had "little difficulty in concluding that union members were 'members' without regard to their voting rights." *Id.* at 606. As an example of the type of "organizational attachment" that the Commission's rule improperly failed to recognize as significant, the court of appeals pointed to the fact that many members of the Chamber of Commerce "participate in [its] policy formulating committees, which for such an organization is clearly an important function." *Id.* at 605.

In response to the *Chamber of Commerce* decision, the Commission has expressly recognized the invalidity of its unduly narrow definition of "members" -- the same definition that it applied to AIPAC in this case. In a recent advisory opinion, the Commission overturned prior rulings to the contrary and concluded that lessees of seats on the Chicago Mercantile Exchange were "members" of the Exchange within the meaning of FECA even though they lacked voting rights. Advisory Op. 1997-5 (May 16, 1997). In reaching that conclusion, the Commission specifically relied on the broader definition of "member" adopted by the court of appeals in the *Chamber of Commerce* case. As the Commission conceded, the court of appeals had "determined that significant portions of [the Commission's regulatory definition] were invalid" because "they defined the term 'member' in an unduly restrictive fashion," and thus the Commission's bright-line voting rights requirement was "now invalid in the District of Columbia Circuit." *Id.* at n.9.[5]

The Commission's determination that AIPAC's members did not qualify as "members" under FECA, and thus that AIPAC could be found to have engaged in election-related communications to non-members, cannot stand in light of the *Chamber of Commerce* decision and the Commission's express recognition of the invalidity of the standard it applied to AIPAC. There can be no doubt about the outcome of any reexamination of that question under the proper legal standards: AIPAC's members qualify as "members" within the meaning of the Act.

It is uncontroverted that AIPAC is a membership corporation under the laws of the District of Columbia and that the individuals to whom AIPAC allegedly made election-related communications qualify as its members in accordance with its bylaws and District of Columbia law. G.C. Br. 81; D.C. Code Ann. §§ 29-512 through 29-514; *see NRWC*, 459 U.S. at 204-05 (looking to state law for guidance in determining meaning of "members" under FECA). It is equally clear that AIPAC expressly solicits and enrolls its members as such and that AIPAC members take af-

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[5] In response to a petition for rulemaking filed with the Commission in February 1997 (*see* 62 Fed. Reg. 13355 (Mar. 20, 1997)), the Commission recently issued an Advance Notice of Proposed Rulemaking requesting "comments on how to revise its rules governing who is a 'member' of a membership association" in light of the *Chamber of Commerce* decision. 62 Fed. Reg. 40982, 40982-83 (Jul. 31, 1997). Comments are due by September 2, 1997, after which time the Commission "may issue a Notice of Proposed Rulemaking . . . seeking comments on specific regulatory language." *Id.* at 40984.

firmative steps to join the organization, pay a substantial amount of annual dues, and receive specific rights and privileges associated with membership, including the right to receive AIPAC publications, participate in AIPAC activities, attend meetings of the Executive Committee and other AIPAC committees, attend AIPAC's annual Policy Conference, and debate and vote on the Policy Statement that sets AIPAC's policy positions for the year. G.C. Br. 77-91, 97-99; G.C. Rep. 19.

Under any interpretation of the term "members" (other than the wooden and unduly narrow construction originally applied by the Commission), it seems clear that AIPAC's members would qualify as such under FECA. The *Chamber of Commerce* decision confirms that dues-paying members who possess the right to participate in policy formulation for their organizations -- a category that plainly includes AIPAC's members -- qualify as "members" under FECA. Moreover, even the Commission's General Counsel found that the payment of dues by AIPAC members "constitutes a significant financial attachment" (G.C. Br. 98) -- a finding that conclusively establishes that AIPAC's members meet the first prong of the disjunctive test for membership suggested by this Court in *NRWC*. *See* 459 U.S. at 204 ("significant financial or organizational attachment").

Given that the Commission found AIPAC's members to present a "close case" even under its prior reading of the Act, it is readily apparent that the Commission would reach a contrary conclusion under its revised view of the law.[6] As a result, there is no

[6] Interestingly, the Commission's advance notice of proposed rulemaking (*see supra* note 5) identified a number of "organizational attachments" as potentially satisfying the requirements for "member" status, including "the right to serve on policy-making boards and/or vote on policy issues" and "eligibility to be elected to governing positions in the organization." 62 Fed. Reg. at 40984. AIPAC's members clearly possess these "organizational attachments" as well.

reason to address the validity of the "major purpose" test in this case, because under no circumstances could AIPAC be found to be a "political committee" or be subjected to an enforcement proceeding under the Act with respect to the conduct giving rise to this case.

II. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE VACATED AND THE CASE REMANDED FOR DISMISSAL OR RECONSIDERATION

The Commission disposed of respondents' administrative complaint by closing the case without attempting to impose any penalty on AIPAC. As a result, AIPAC had no basis for challenging the Commission's erroneous determination of the membership issue, and did not seek judicial review of that determination.[7] Nonetheless, this Court is not required to ignore reality and decide the case as if the validity of the "major purpose" test would actually affect the ultimate outcome. To the contrary, prudential and justiciability concerns militate strongly in favor of vacatur of the judgment below.[8]

[7] AIPAC did seek to raise the membership issue as *amicus curiae* in the district court, but the court granted the parties' motion to strike AIPAC's *amicus* brief. Pet. App. 78a n.1.

[8] Of course, if the Court were to conclude that respondents lacked standing to challenge the Commission's discretionary decision not to take any enforcement action, there would be no need to consider either the membership issue or the

It is well established that this Court will not decide even a properly formulated and presented constitutional issue if non-constitutional grounds exist for resolution of the case. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) ("prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision"); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944) (stating that the constitutional question must be "unavoidable"); *see also Paulussen v. Herion*, 475 U.S. 557 (1986) (per curiam). This fundamental rule arises from the admonition of Article III "'not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . .'" *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 570 n.34 (1947).

Any resolution of the validity of the "major purpose" test would necessarily entail careful consideration of the scope of First Amendment protections for associational activities and political speech. The court of appeals' rejection of the "major purpose" test squarely implicates the concern that "compelled disclosure . . . can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *see Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing "grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not under the control of a

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"major purpose" test. AIPAC expresses no opinion on the standing question.

'candidate' or directly related to promoting or defeating a clearly identified 'candidate' for federal office"); *see generally NAACP v. Alabama*, 357 U.S. 449 (1958); Pet. 17-20.

As this Court held in *Buckley*, "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." 424 U.S. at 64. Resolution of the "major purpose" issue in this case would require the Court to consider whether the governmental interests supporting compelled disclosure of contribution and expenditure data from issue advocacy organizations that arguably engage in a relatively small amount of election-related activity are sufficiently compelling to justify the resulting burdens on free speech and associational rights. The well-established rule against unnecessarily deciding weighty constitutional issues thus counsels against the Court's reaching the "major purpose" issue if any non-constitutional basis for disposing of the case exists.

Plainly, the antecedent statutory question of whether AIPAC's members qualify as "members" under the Act provides a straightforward statutory basis for resolving this case without reaching the constitutional issues directly and necessarily implicated by the "major purpose" question. The fact that this antecedent issue has not been raised or litigated by the parties is not dispositive, because the Court's power to decide cases is not limited by the terms of the questions presented in the petition for certiorari. *See Procunier v. Navarette*, 434 U.S. 555, 559-60 n.6 (1978); *Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971) (the Court's Rules "do[] not limit our power to decide important questions not raised by the parties"). In appropriate circumstances, the Court has rested its decision on grounds that were not raised by the parties but were logically antecedent to the ques-

tions presented in the petition for certiorari. *See*, *e.g.*, *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77-78 (1990); *Teague v. Lane*, 489 U.S. 288, 300 (1989).

Indeed, it is open to question whether the parties have a sufficiently concrete interest in resolution of the "major purpose" issue to permit judicial consideration of that issue in this case. As discussed in the preceding section, intervening changes in the law governing the membership issue have effectively eliminated the possibility that the Court's disposition of this case could grant respondents the relief they claim to be seeking. Regardless of the Court's ultimate answer to the abstract legal question posed by the parties in this case, AIPAC cannot and will not be found to be a "political committee" subject to FECA's broad disclosure obligations, because the conduct giving rise to this case involved communications between AIPAC and its members that are statutorily immune from treatment as "expenditures."

This Court has an "obligation essentially to search the pleadings on core matters of federal-court adjudicatory authority -- to inquire not only into this Court's authority to decide the questions petitioners present, but to consider, also, the authority of the lower courts to proceed." *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1071 (1997). Thus, the fact that the parties and the court below were willing to litigate and resolve the "major purpose" issue does not eliminate this Court's authority or obligation to consider whether intervening developments in the law affecting the antecedent membership issue have effectively rendered this case moot.

"Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988); *see also Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964).

An actual controversy must exist at all stages of appellate review. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 389 (1994). "To satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983) (per curiam). A case is moot when "the parties lack a legally cognizable interest in the outcome" (*Powell v. McCormack*, 395 U.S. 486, 496 (1969)) or when it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992).

This case is unquestionably moot if, as demonstrated above, AIPAC's members qualify as "members" under FECA as newly interpreted by the Commission and the federal courts. Under these circumstances, the proper disposition of the case is clear: the Court should vacate the judgment of the court of appeals and remand with directions that respondents' complaint be dismissed as moot. *See*, *e.g.*, *Arizonans for Official English v. Arizona*, 117 S. Ct. at 1071; *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988); *Mechling Barge Line v. United States*, 368 U.S. 324, 329 (1961); *United States v. Munsingwear Inc.*, 340 U.S. 36, 39 (1950). The Court has consistently followed this course where, as here, an intervening change in the law has caused a case to "'los[e] its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions.'" *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam); *see, e.g.*, *Frank v. Minnesota Newspaper Ass'n, Inc.*, 490 U.S. 225, 226 (1989) (per curiam); *Munsingwear*, 340 U.S. at 39-41; *see also*

Commercial Cable Co. v. Burleson, 250 U.S. 360, 362-63 (1919).[9]

Even if there were some remaining doubt about the proper resolution of the antecedent "membership" question, vacatur would nonetheless be the proper course in this case. Under any view of the law, it is highly doubtful that this Court's resolution of the "major purpose" issue would have any impact on the ultimate outcome of the case. Neither the court below nor the Commission itself has had any opportunity to consider the effect of the evolving legal test for membership status on the issues presented in this case, and it is at least likely -- indeed, certain, in AIPAC's view -- that consideration of that issue would obviate the need to consider the "major purpose" test.

In similar circumstances, this Court has found it appropriate to vacate the judgment below and remand for reconsideration in light of intervening legal developments. *See, e.g., Bureau of Econ. Analysis v. Long*, 454 U.S. 934 (1981) (vacating and remanding for further consideration in light of an intervening statutory enactment); *Dupris v. United States*, 446 U.S. 980 (1980) (vacating and remanding for consideration of potential mootness). An administrative agency's change in its interpretation of a federal statute is

[9] To be sure, the Commission has an institutional interest in obtaining a final judicial determination of the validity of the "major purpose" test -- in the same sense that litigants frequently have an interest in obtaining advisory opinions from this Court on important legal issues that could affect other cases. Article III of the Constitution does not, however, permit this approach to judicial decisionmaking. *See Lewis v. Continental Bank Corp.*, 494 U.S. at 479 ("the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether [the plaintiff] has a stake in that relief").

clearly an appropriate ground for exercise of this authority. *See, e.g., Lawrence ex rel. Lawrence v. Chater*, 116 S. Ct. 604, 606-10 (1996); *see also City of Chicago v. Environmental Defense Fund*, 506 U.S. 982 (1992).

Accordingly, under any view of the law, the Court should not accept the parties' invitation to address the weighty constitutional issues inherent in deciding the validity of the "major purpose" test. Instead, the Court should vacate the judgment of the Court of Appeals and remand for dismissal of respondents' complaint or for reconsideration of the antecedent membership issue in light of intervening developments in the interpretation and application of FECA's statutory exemption for communications with "members."

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be vacated and the case remanded with directions to dismiss respondents' complaint or, in the alternative, to remand the case to the Commission for it to make clear that all of AIPAC's members qualify as "members" within the meaning of FECA.

Respectfully submitted.

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No. 96-1590

In The

Supreme Court of the United States

October Term, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, and ORIN PARKER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF THE PETITIONER

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QUESTION DEALT WITH HEREIN

Under this Court's precedents, the First Amendment protects "issue advocacy" absolutely – against monetary limitations and against disclosure provisions. However, the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* (FECA), defines the term "political committee" broadly to include groups of citizens which make "contributions" or "expenditures" of $1,000 in a calendar year. A group defined as a "political committee" is subjected to burdensome disclosure requirements and severe contribution limits. Thus, organizations which make expenditures almost exclusively for "issue advocacy" are subjected to such onerous requirements and limitations if they have made a single $1,000 contribution to a candidate within a calendar year. Does the "major purpose test," enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (*Buckley*) and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), equally apply to an organization that makes "contributions," as well as to one that makes "expenditures," thereby avoiding the chilling effect on "issue advocacy," which results from a broad definition of "political committee"?

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INTEREST OF THE AMICUS CURIAE

The National Right to Life Committee, Inc. (NRLC) is a nonprofit organization whose purpose is to promote respect and dignity for all human life. NRLC engages in various political, legislative, legal and educational activities to further the concept of the sanctity of human life. In doing so, NRLC routinely makes expenditures for issue-oriented communications advocating its political point of view on pro-life issues. Under the ruling of the court of appeals, NRLC's First Amendment right to engage in such communications without being subject to severe burdens on such speech could be threatened. NRLC seeks to protect its exercise of First Amendment rights by addressing the legal issues presented by this case.[1]

INTRODUCTION

The First Amendment's protection of political speech occupies a venerable position in the Nation's history and in this Court's jurisprudence. The Court has long recognized that political speech is critical to the functioning of our representative democracy. Without it, we lack even the rudimentary capacity to ensure the election of leaders who will represent us faithfully and well. For, if the mortar of free political speech is permitted to crumble, the edifice of self-government will inevitably fall and, with it, the manifold liberties protected by the Constitution. For this reason, this Court has always staunchly protected political speech. Moreover, recognizing that the right of political association is integral to the

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[1] Consents from parties to filing this Brief have been filed with the Clerk of this Court. *Amicus Curiae* National Right to Life, Inc. supports the position of the Federal Election Commission with respect to the issue of the "major purpose test."

Counsel for a party did not author this Brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members or its counsel made a monetary contribution to the preparation and submission of this Brief.

exercise of political speech, this Court has vigorously protected political association as well.

STATEMENT OF THE CASE

Under the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* (FECA), an organization which is properly termed a "political committee" is subject to various reporting and disclosure requirements. As the court below stated,

> [o]nce designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200.

Akins v. Federal Election Commission, 101 F.3d 731 (D.C.Cir. 1997) (*Akins*).[2] This Court has held that such reporting and disclosure requirements constitute burdens on free speech which may not be imposed absent a compelling governmental interest which is implemented by narrowly-tailored means. *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976) (*per curiam*) (*Buckley*). Although such requirements and limitations can be constitutionally imposed on *true* political committees, this Court recognized the danger of applying them to groups of citizens which engage in "issue discussion." *Id.* at 78-80.

Because "issue discussion" (or "issue advocacy" as it is more often termed) resides at the heart of First Amendment concerns, this Court developed what has come to be known as

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[2] The court below also noted that designation as a "political committee" results in a limitation on the right of a group to make contributions to a political candidate: "[a]nd [a group designated as a political committee] is prohibited from contributing more than $1,000 to any candidate." *Akins v. Federal Election Commission*, 101 F.3d 731, 734 (D.C.Cir. 1997) *citing* 2 U.S.C. § 441a(a). Contribution limits represent even more severe restrictions on political speech and association than do disclosure requirements. As this Court made clear in *Buckley v. Valeo*, contribution limits implicate the rights to free speech and freedom of association and, therefore, are subject to exacting scrutiny. 424 U.S. 23-25.

the "major purpose test." *Id.* Under that test, a group which engages in issue advocacy may not be considered a "political committee" (thus becoming subject to burdensome disclosure requirements and limitations upon the right to make contributions) unless it is under the control of a candidate or unless its "major purpose" is the election or defeat of candidates. *Id.* at 79.

In this case, Respondents Akins *et al.* filed a complaint with the Federal Election Commission (FEC) alleging that the American Israel Public Affairs Committee (AIPAC) was a "political committee" under the definition contained in 2 U.S.C. § 431(4)(A), because it "had made campaign contributions and expenditures in excess of $1,000." *Akins*, 101 F.2d at 734. According to the complaint, AIPAC met the statutory definition of political committee because it used full-time staff to meet with candidates for federal office, disseminated campaign literature and encouraged its supporters to provide aid to political candidates, and such activities allegedly cost more than $1,000. *Id.* However, the FEC found that there was not probable cause to believe that AIPAC was a political committee because "its campaign-related activities were only a small portion of its overall activities and not its major purpose." *Id.* Indeed, AIPAC had an annual budget of $10,000,000, only a very small percentage of which was alleged to have been dedicated to putative "contributions." *See id.* at 744 n.13. Believing that "an organization is a political committee only if its major purpose is the influencing of federal elections," the FEC dismissed the complaint. *Id.* at 734 and 735.

Respondents sued the FEC pursuant to 2 U.S.C. § 437g(a)(8), a provision which allows a complainant to challenge the agency's refusal to institute enforcement proceedings. *Id.* at 734. The district court ruled in favor of the FEC, holding that its interpretation of the term "political committee" was "reasonable." *Id.* at 735. The court of appeals initially affirmed, but upon re-hearing, reversed. *Id.* at 735 and 744. This Court granted the FEC's petition for a writ of *certiorari*.

Respondents ask the Court to do what it has never done: to permit wholesale infringement of issue-oriented political speech by groups of citizens solely because such groups have exercised their right to free association by making small monetary contributions to candidates for political office. Such is the inevitable effect of the ruling of the court below. In order to prevent such infringement of First Amendment rights, this Court should reverse the lower court's decision.

SUMMARY OF THE ARGUMENT

Historically, this Court has recognized that a concern for the protection of political speech lies at the heart of the First Amendment. *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). This concern stems from the instrumental role of free speech in the machinery of representative self-government. *Buckley*, 424 U.S. at 14-15. In the specific context of election law, this Court has placed an impermeable protective barrier around that species of political speech known as "issue advocacy." *Id.* at 39-51. It has done so by developing the "express advocacy test" and the "major purpose test," two constitutionally-required limiting constructions. *Id.* at 78-81. Whereas the "express advocacy test" focuses on the nature of the speech, the "major purpose test" focuses on the identity of the speaker. *Id.* at 79. Ultimately, both tests have the same *raison d'etre*: to protect issue advocacy from governmental infringement. *Id.* They work in tandem, as two necessary components of one speech-protective judicial mechanism. *Id.*

The decision of the court below, however, misunderstands the vital role of the major purpose test in protecting the right of groups to engage in issue advocacy without the heavy burdens which apply to political committees. Being labelled as a "political committee" under FECA (for the mere act of making a $1,000 contribution to a candidate) would result in subjecting an organization's expenditures for *issue advocacy* to FECA's disclosure provisions and, as stated above, would severely limit contributions. Yet this Court has placed issue advocacy entirely beyond the reach of governmental regulation; it has never permitted issue advocacy to be burdened in

any manner, not even by disclosure provisions. In order to buttress this protection of issue advocacy, this Court should prevent circumvention of the "express advocacy test" through the lower court's ill-conceived interpretation of the "major purpose test." This Court should do so by holding that an organization is not a "political committee" under FECA unless its major purpose (determined by objective standards) is the nomination or election of candidates.

ARGUMENT

I. IN ORDER TO PRESERVE REPRESENTATIVE SELF-GOVERNMENT, THIS COURT HAS STAUNCHLY PROTECTED POLITICAL SPEECH IN GENERAL, AND ISSUE ADVOCACY IN PARTICULAR.

A. Free political speech is indispensable to the functioning of democracy.

The protection of political speech has a long provenance in this Court's case law. As this Court stated in *New York Times v. Sullivan*, "that freedom of expression on public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. at 269. Indeed, "public discussion" is not only a political right, it "is a political duty." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring). This stems from the fact that the "opportunity for free political discussion" is vital to assuring "that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

Thus, "the public discussion of issues" resides at the core of First Amendment concerns. *Buckley*, 424 U.S. at 39. This proposition is manifest both on the face of the First Amendment and in the circumstances of its adoption. The framers of the Amendment made clear their intention that the protection of political discourse was their goal. *See Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 n.17 (D.C.Cir.), *cert. denied*, 454 U.S. 897

(1981). As this Court explained in *Buckley*, there is no doubt that the First Amendment's framers specifically intended to protect political speech: "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." 424 U.S. at 14, *quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966). This intention was based, at least in part, on the instrumental role of free speech in the system of representative self-government established by the Constitution. That is, the framers understood that free political speech is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. This Court stated that,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Id. at 14-15. As a practical matter, unless citizens may exercise their right to speak freely on political matters – including discussions of candidates and their qualifications – self-government is impossible. In order to make good decisions regarding who will represent us, citizens must have access to ideas and information concerning the positions candidates take on issues and to their fitness to hold office (their character, accomplishments and qualifications). *Id.* In order for those ideas and that information to be available to the electorate, there must be free commerce in the marketplace of ideas. If the marketplace of ideas is compromised by the governmental restrictions on speech, then self-governance will suffer and so too will all of the other freedoms guaranteed by the Constitution. As this Court has stated, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Id.* at 49 n.55.

Free speech on political matters, then, is the key to the preservation of self-government and concomitant personal liberties. This Court's decisions have been unanimous in upholding this principle. Political free speech is strictly guarded by the Constitution for at least three inextricably

interwoven reasons: (1) because it was the Framer's intention to preserve free speech (which is obvious on the face of the First Amendment and in the history surrounding its adoption); (2) because political speech has an indispensable role in the preservation of self-government; and (3) because, given its role in preserving self-government, free political speech undergirds all other civil liberties protected by the Constitution. In addition, as this Court's precedents show, free political speech must be protected purely as a matter of individual civil liberty.[3]

Adhering to this Court's traditional jurisprudence, the *Buckley* Court rooted its First Amendment analysis in the purpose of protecting the institutions of democracy. 424 U.S. at 14-15. Therefore, it is evident that the *Buckley* Court was avid to protect political speech against infringement under FECA.

B. This Court developed the "express advocacy" test in *Buckley* in order to protect the free discussion of issues in political campaigns.

In *Buckley*, this Court recognized that certain provisions of FECA inhibit the exercise of protected political speech.[4] In

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[3] "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means." *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 n.10 (1986) (*MCFL*) *quoting Whitney v. California*, 274 U.S. 357, 375 (1927) Brandeis, J., concurring.

[4] This section of the Brief explains this Court's development of the "express advocacy test" in *Buckley* as a constitutionally-mandated narrowing construction of FECA. Although the "express advocacy test" is not directly at issue in this case, it is inextricably intertwined with the "major purpose test" which is the central focus of this case. The "express advocacy test" is discussed at this point in the Brief in order to provide a foundation for the subsequent discussion of the "major purpose test." For a thorough discussion of the "express advocacy test" and the "major purpose

considering the constitutionality of the provision then contained in 2 U.S.C. § 434(e) (which required disclosure of campaign-related contributions and expenditures by persons other than political committees), this Court stated that the provision

> raises serious problems of vagueness particularly treacherous where . . . the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights.

Buckley, 424 U.S. at 76-77. Section 434(e) required

> "[e]very person . . . who makes contributions or expenditures" aggregating over [a certain threshold] in a calendar year . . . to file a statement with the Commission.

Id. at 74-75. As this Court noted,

> "[c]ontributions" and "expenditures" are defined in parallel provisions in terms of the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or election of candidates for federal office.

Id. at 77 (footnote omitted). This Court explained that "it is the ambiguity of this phrase ["for the purpose of . . . influencing"] that poses constitutional problems." *Id.* That phrase was constitutionally infirm because it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79 (footnote omitted). Therefore, in order to "insure that the reach of § 434(e) is not impermissibly broad," this Court narrowly construed the term "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80.

In a footnote to the term "expressly advocate" in the last-quoted passage, the Court referred to an earlier footnote in

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test," *see* James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U. WEST. L.A. L. REV. 1 (1997).

Buckley (424 U.S. at 44 n.52) in which it had defined "express advocacy" for the purpose of narrowly construing a different provision of FECA. *Id.* at 80 n.108. In the earlier footnote, this Court explained that the section of FECA which placed a $1,000 annual ceiling on expenditures . . . relative to a clearly identified candidate must be

> restrict[ed] . . . to communications containing *express words of advocacy* of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."

424 U.S. at 44 n.52 (emphasis added).

The *Buckley* Court referred to this constitutionally-required narrowing construction (which has become known as the "express advocacy test") repeatedly throughout the opinion. In no fewer than eight separate references,[5] this Court made clear that the "express advocacy test" was a "narrow[ ] and explicit[ ] constru[ction]" of FECA, *id.* at 44, which reached only communications which include "explicit words of advocacy" or communications which "in express terms

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[5] This Court described "express advocacy" in the following words: (1) "explicit words of advocacy," *Buckley*, 424 U.S. at 43; (2) "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office," *id.* at 44; (3) "communications containing express words of advocacy of election or defeat," *id.* n.52; (4) "expenditures that in express terms advocate the election or defeat of a clearly identified candidate," *id.* at 45; (5) "express advocacy of election or defeat," *id.*; (6) "funds for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.* at 80; (7) "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate," *id.*; and (8) "expenditures that expressly advocate a particular election result," *id.* Thus, it is clear that "express advocacy" is a very narrow term.

advocate the election of defeat of a clearly identified candidate for federal office."[6] *Id.* at 43-44. The Court further characterized the "express advocacy" test as the "exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness. . . . " *Id.* at 45.

It is noteworthy that the court of appeals in *Buckley* had attempted to deal with the perceived vagueness of 18 U.S.C. § 608(e)(1) by reading the phrase " 'relative to' a candidate to be read to mean 'advocating the election or defeat of a candidate.' " 424 U.S. at 42. However, this Court held that "the Court of Appeals was mistaken in thinking that this construction eliminates the problem of unconstitutional vagueness altogether." *Id.* Thus, this Court insisted that mere 'advocacy of election' was not enough to bring a communication within the purview of the statutory limitation; rather, the communication must contain "explicit words of advocacy." *Id.* at 43.

There is a pragmatic reason why the express advocacy test must be narrow and explicit. It is because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. This follows from the fact that

> [c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. The close relationship between candidates and issues makes the distinction between issue advocacy and electoral advocacy problematic for the speaker; he is placed in a position of doubt, not knowing whether to censor his own speech. As *Buckley* explained,

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[6] "Express" is defined to mean "clear, definite, explicit. . . . " BLACK'S LAW DICTIONARY 580 (6th ed. 1990). Thus, "express" and "explicit" are synonymous.

> [n]o speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945). In order to avoid the "constitutional deficiencies" described in the foregoing quotation (*i.e.*, vagueness and overbreadth leading to self-censorship), *Buckley* held that the statutory expenditure limitations must be "limited to communications that include *explicit words of advocacy* of election or defeat of a candidate." 424 U.S. at 43 (emphasis added).

Under *Buckley's* definition of "express advocacy," disbursements for political communications are accorded complete protection under the First Amendment as long as they remain outside the narrowly-circumscribed category of "express advocacy." Indeed, this Court has never upheld any restriction whatsoever on "issue advocacy" but has placed it beyond the reach of government control. As the Court concluded, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election of a clearly identified candidate, *they are free to spend as much as they want to promote the candidate and his views.*" *Id.* at 45 (emphasis added).

The lower federal courts have uniformly followed *Buckley* in its stringent protection of issue advocacy. The courts have held that the "express advocacy" standard is a strict, bright-line test which must be applied according to its precise terms in order to protect issue advocacy from infringement. Accordingly, they have rejected any suggestion that the

express advocacy test requires anything less than explicit words of advocacy.[7]

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[7] There are many lower court cases holding that the "express advocacy" standard must be construed narrowly. *See, e.g., Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980) (rejecting the FEC's position (in an enforcement action) which would "have [the court] read 'expressly advocating the election or defeat' to mean for the purpose, express *or implied*, of encouraging election or defeat" and stating that such an expansive interpretation of express advocacy would violate the "firmly established principle that the right to speak out at election time is one of the most zealously protected under the Constitution"); *see, also, Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946 (W.D.Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996) (television advertisement identifying candidate Bill Clinton as pro-homosexual was not express advocacy); *Faucher v. Federal Election Commission*, 743 F. Supp. 64 (D.Me. 1990), *aff'd*, 928 F.2d 468 (1st Cir. 1991), *cert. denied sub nom. Federal Election Commission v. Keefer*, 502 U.S. 820 (1991) (FEC regulation purporting to permit corporate expenditures for voter guides only where guides expressed no opinion on the "issues" covered was beyond FEC's authority under § 441b); *Federal Election Commission v. Survival Education Fund, Inc.*, No. 89 Civ. 0347 (TPG), 1994 WL 9658 (S.D.N.Y.) (expressions of hostility to the positions of an official are not express advocacy even when the implication that the official should not be re-elected is quite clear), *aff'd in part and rev'd in part on alternate grounds*, 65 F.3d 285 (2nd Cir. 1995); *Clifton v. Federal Election Commission*, 927 F. Supp. 493, 500 (D.Me. 1996) (FEC's voter guide and voting record regulations are beyond FEC's authority "because they restrict issue advocacy in connection with expenditures"), *aff'd on alternate grounds*, No. 96-1812 (1st Cir. 1996); *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 839 F. Supp. 1448 (D.Colo. 1993) (advertisement paid for by party committee did not constitute "express advocacy" although it criticized the likely candidate of the other party), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded*, ___ U.S. ___, 116 S.Ct. 2309 (1996); *Federal Election Commission v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989) (solicitation letters by organization were discussions of public issues which by their nature raised the names of candidates, and therefore, not "express advocacy"); and *Federal Election Commission v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315 (D.D.C. 1979) (a "Nixon-Ford" poster circulated prior to the 1976 election was not "express advocacy" although it included a clearly identified candidate and could have tended to influence voting).

Not only does the government lack the power to limit the *amount* of money spent on issue advocacy, *Buckley* made it clear that government does not even have the power to place the burdens entailed by FECA's disclosure provisions on issue advocacy. Issue advocacy is thus beyond the reach of legislative encroachment, either by monetary limitations or by reporting and disclosure requirements. As this Court held, the disclosure provisions of FECA do "not reach all partisan discussion for [they] only require[] disclosure of those expenditures that expressly advocate a particular election result." 424 U.S. at 80.

C. By protecting issue advocacy from infringement, the "express advocacy" test assures that debate on public issue will remain robust.

This Court developed the "express advocacy" test specifically to implement the central purpose of the First Amendment: the protection of political speech from governmental infringement and concomitant self-censorship. This Court has stated that the purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times*, 376 U.S. at 270. This principle has particular relevance in the field of election law, because such laws by their very nature seek both to limit the amount of money spent in connection with campaigns and to place other kinds of restrictions on expenditures for political communications (such as disclosure, reporting and registration requirements). *See, e.g.*, 2 U.S.C. §§ 434(b) and 441b. As this Court has explained,

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of

> expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

Buckley, 424 U.S. at 18-19. Thus, the *sine qua non* of robust political discourse is the ability to spend money for political communications. Therefore, while acknowledging that Congress has the general constitutional power to regulate elections for federal office, *id.* at 13, this Court has recognized that the regulation of the election process is fraught with peril to First Amendment freedom of speech. As this Court stated, "[t]he Act's contribution and expenditure limitations operate in an area of the *most fundamental* First Amendment activities." *Id.* at 14 (emphasis added). In particular, this Court wished to protect "issue advocacy" from regulation.

"Issue advocacy" is a broad category which comprises virtually the whole realm of political speech. It encompasses not only abstract discussions of political issues, but also speech concerning candidates. Thus, the statement "Candidate Smith is pro-life" is pure issue advocacy. As this Court recognized, the electorate is concerned not only with what the proper position is regarding an abstract issue, but what position a candidate adopts on such issue. That "Smith is pro-life" (as opposed to whether, considered as an abstract matter, the pro-life position is the correct one) is *itself an issue of vital importance* because the electorate must know such data in order to exercise the franchise wisely. Therefore, that statement is accorded the highest degree of First Amendment protection. To afford protection only to statements concerning the abstract proposition that the pro-life position is correct, while denying protection to the statement "Smith is pro-life" would undercut the instrumental rationale of the First Amendment's protection of political speech discussed above. Simply put, the voting public must have access to the candidates' positions on issues if the American experiment in representative self-government is to succeed. Likewise, speech concerning a candidate's character, qualifications and accomplishments are issue advocacy and, as such, are protected, for a candidate's capacity to carry out the duties of elective office is always at issue in an election. *Buckley*, 424

U.S. at 14-15. Finally, as the *Buckley* Court noted, campaigns themselves generate issues of importance; therefore, speech about the conduct of campaigns is issue advocacy.[8]

As explained above, this Court protected issue advocacy principally through the development of the "express advocacy" test. In addition, however, this Court protected issue advocacy through the development of the "major purpose test" which (as more fully explained below) is a necessary adjunct to the "express advocacy test."

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[8] This Court's solicitude for "issue advocacy" is measured in part by the great breadth of the definition of that term. For issue advocacy is the antithesis of "express advocacy," and, to the extent that the latter term denotes an extremely narrow category (*see* footnote 5 above), "issue advocacy" is correspondingly broad. Issue advocacy includes all political speech which does not include "explicit words of advocacy of election or defeat of a candidate. . . . " *Buckley*, 424 U.S. at 43. As this Court frequently indicated in *Buckley*, issue advocacy is more than "the mere exposition of ideas." *Id.* at 14. It comprehends much more than the abstract or theoretical discussion of political ideas, but rather, much that is overtly political and much that is directly related to campaigns for elective office. At the very least, issue advocacy comprehends the following: (1) "debate on the qualifications of candidates," *id.* at 14; (2) the "free discussion of governmental affairs," *id.*; (3) "discussions of candidates," *id.*; (4) discussions of the "positions [which candidates take] on various public issues," *id.* at 42; (5) speech concerning "issues of public interest" generated by "campaigns themselves," *id* at 42-43; (6) communications regarding "candidates and their positions [on issues], their voting records and other official conduct," *id.* at 43 n.50; (7) "spend[ing] . . . to promote the candidate and his views," *id.* at 45; (8) "the discussion of public policy," *id.* at 48; and (9) "advocacy of the passage or defeat of legislation," *id.*

II. THE "MAJOR PURPOSE TEST" IS A NECESSARY ADJUNCT TO THE "EXPRESS ADVOCACY TEST"; THE TWO TESTS WORK IN TANDEM TO PROTECT ISSUE ADVOCACY.

A. This Court developed the "major purpose test" in *Buckley* in conjunction with the "express advocacy test" in order to protect issue advocacy.

Above (part II, B hereof) *Amicus Curiae* NRLC discussed the portion of the *Buckley* opinion in which the Court applied the "express advocacy" test to the general disclosure provision of FECA (then-section 434(e)). The "major purpose test" was developed in that same portion of the opinion and, as will be shown, is a necessary adjunct to the "express advocacy" test because it serves to protect the issue advocacy of "non-political committee" groups.

2 U.S.C. § 434(e) required "[e]very person"[9] who makes "contributions or expenditures" greater than $100 in a calendar year to "file a statement containing the information required by" section 434 (which was captioned "[r]eports by political committees and candidates"). Subpart (b) of section 434 required disclosure of a plethora of information concerning receipts and expenditures.

But there was a serious constitutional problem with section 434(e). As this Court explained,

> Section 434(e) applies to "[e]very person . . . who makes contributions or expenditures." "Contributions" and "expenditures" are defined in parallel provisions in terms of the use of money or other valuable assets "for the purpose of . . . influencing" the nomination or election of candidates for federal office.

[9] "Person" was statutorily defined as "an individual, partnership, committee, association, and any other organization or group of persons." 2 U.S.C. § 431(h).

Buckley, 424 U.S. at 77. The Court found the phrase "for the purpose of . . . influencing" to be "ambiguous." *Id.* It presented the specter of "vagueness" and overbreadth[10] because it had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. Thus, under the plain language of section 434(e), it was possible for a group of persons "other than a political committee . . . "[11] to be subject to the same burdensome disclosure requirements that pertained to *political committees* even though such group engaged in *nothing but issue advocacy*. Simply put, any "person" who spent more than $100 in a year "for the purpose of influencing" an election was required to comply with onerous reporting provisions. However, the phrase which triggered those requirements ("for the purpose of . . . influencing") was constitutionally infirm because of its inherent overbreadth: in addition to express advocacy, that phrase encompassed *issue advocacy*. Issue advocacy could not be infringed because it comprised speech which this Court made clear was entitled to the utmost First Amendment protection due to its integral role in our democracy. *Buckley*, 424 U.S. at 14-15. Thus, a person who did nothing more than discuss issues which arose during campaigns for federal office would have to comply with all of the disclosure provisions of § 434. But, as the Court recognized, FECA imposed criminal sanctions, and "fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." 424 U.S. at 76. In that event, issue advocacy – vital to the health of representative self-government – will have been irretrievably lost to the electorate. To obviate that problem, this Court placed a narrowing construction on 2 U.S.C. § 434(e):

[10] Although the Court termed the problem with § 434(e) one of "vagueness," it is apparent that it included within that term the related problem of overbreadth. *See MCFL*, 479 U.S. at 623.

[11] *See* 2 U.S.C. § 434(e) reprinted in *Buckley's* appendix, 424 U.S. at 160.

> To insure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

424 U.S. at 80.

It is readily apparent that this Court applied the express advocacy test to section 434(e) in order to save issue advocacy from the threat of self-censorship stemming from a vague and overbroad provision enforced by criminal sanctions. Identical reasoning underlay this Court's development of the "major purpose test."

This Court recognized that § 434(a)-(d), which set forth the provisions requiring "reports by political committees," could reach the same result (*i.e.*, severely burdening and chilling issue advocacy) as did § 434(e). Since the general definition of "political committee" contained in § 431(4)(A) defined that term "only in terms of annual 'contributions' and 'expenditures,' " and since those terms, in turn, incorporated the overbroad phrase "for the purpose of . . . influencing," the definition of "political committee" also reached issue advocacy – only by a different route. In short, a group could have its issue advocacy chilled in either one of two ways: (1) as a "person" which makes "expenditures" (*i.e.*, money spent "for the purpose of . . . influencing" elections) of more than $100 in a calendar year; or (2) as a "political committee" under § 431(4)(A) *i.e.*, a group which makes "expenditures" (money spent "for the purpose of . . . influencing" elections) exceeding $1,000 in a calendar year. In either event, the ultimate outcome is the same: a group which does nothing (or next to nothing) -other than make disbursements for issue advocacy communications is subject to all of the burdensome reporting requirements (and contribution limits) which pertain to organizations which are *true political committees under FECA*. Although the statutory mechanism differs slightly, the result is identical: issue advocacy is burdened by a vague and overbroad statutory provision.

Indeed, this Court clearly recognized that the two situations were directly analogous. In response to this similarity,

the *Buckley* Court developed the "major purpose test." The Court recognized that "[t]he general requirement that 'political committees' . . . disclose their expenditures could raise similar vagueness problems. . . . " This followed from the fact that " 'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures'. . . . " Therefore, because (as the Court had noted previously) the definition of the term "expenditure" incorporates the vague phrase "for the purpose of . . . influencing," the term political committee *itself* "could be interpreted to reach groups engaged purely in issue advocacy." 424 U.S. at 79. Thus, exactly like § 434(e), the definition of "political committee" in § 431(4)(A) must be constitutionally limited in order to protect issue advocacy against government infringement. Noting that two lower courts had construed the words "political committee" more narrowly, the Court stated that "they need only encompass organizations which are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate." Id.* (emphasis added).

Although the "express advocacy" test focuses on the speech itself, and the "major purpose test" focuses on the nature and identity of the speaker, it is clear that they exist for the same constitutional reasons, and that this Court has understood them as a single mechanism. Both tests are limiting constructions on statutory provisions which, in the absence of such constructions, would be unconstitutional for encompassing issue advocacy. Both of them seek to prevent the chilling effect on speech which results from vague or overbroad provisions. Finally, both of them seek to implement the central rationale of the First Amendment: to safeguard the discussion of issues and thereby to preserve self-government.

B. This Court reaffirmed and further explicated the meaning and rationale of the "major purpose test" in *MCFL*.

In *MCFL*, this Court reaffirmed the "major purpose test" as set forth in *Buckley*. The Court there stated:

> In *Buckley v. Valeo*, this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate."

479 U.S. at 252 n.6. This Court noted that Massachusetts Citizens for Life (MCFL), the organization which was subject to the enforcement proceeding in that case, was not a "political committee" under the *Buckley* definition in the "major purpose test": "[i]t is undisputed on this record that MCFL fits neither of these categories [*i.e.*, it was not under the control of a candidate, nor was its major purpose the nomination or election of a candidate]." *Id.* Rather, "[MCFL's] central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of candidates." *Id.* Furthermore, MCFL, an organization "that only occasionally engage[d] in independent spending on behalf of candidates," would "be classified as a political committee" if its "independent spending became so extensive that the organization's major purpose may be regarded as campaign activity. . . . " *Id.* at 262. In that event, MCFL would be subject to the "full panoply of regulations that accompany status as a political committee under the Act." *Id.*

MCFL's discussion concerning the "major purpose test" confirms both the common-sense approach taken by this Court in framing the test in *Buckley* (which, as shown below, was repudiated by the court of appeals), and confirms that the object of the major purpose "test" was to obviate the chilling effect of the restrictions which pertain to political committee status. The *MCFL* Court made clear that the "major purpose test" looks at the purpose of the *organization* to determine whether its major purpose is the nomination or election of a candidate. That question, in turn, is answered by examining

the organization's disbursements. A group such as MCFL whose "central organizational purpose is issue advocacy" is not a political committee "although it occasionally engages in activities on behalf of candidates." *Id.* at 252 n.6. An organization only becomes a "political committee" if its "independent spending [becomes] so extensive that the organization's major purpose may be regarded as campaign activity. . . . " *Id.* at 262. Moreover, this Court demonstrated that it understood that the burdens associated with political committee status were severe ("the full panoply of regulations that accompany status as a political committee," *id.*) and that they have the capacity to chill an organization's speech ("the administrative costs of complying with [reporting and disclosure obligations] may create a disincentive for the organization . . . to speak.") *Id.* at 254 n.7.

III. THE DECISION OF THE COURT BELOW IS ERRONEOUS AND WOULD RESULT IN THE EVISCERATION OF THE PROTECTION OF ISSUE ADVOCACY UNDER THIS COURT'S "MAJOR PURPOSE TEST."

The court of appeals held that AIPAC was a "political committee" under the definition contained in § 431(4)(A). *Akins*, 101 F.3d at 744 n.13. This was based on the FEC's finding that AIPAC had made at least $1,000 in "contributions" during a calendar year, and, therefore, had fulfilled the statutory requirement for political committee status under FECA. The court of appeals' decision was made, however, despite the fact that AIPAC had "a budget of about $10 million," (*id.* at 734) and despite the FEC's finding that "AIPAC's campaign spending never even reached one percent of its annual budget." *Id.* at 744 n.13.

The court of appeals explained that, although this Court's statements concerning the "major purpose test" (in *Buckley* and *MCFL*) "*can* literally be read to support the FEC's position," *id.* at 741 (emphasis added), the "Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case." *Id.* at 742. The court of appeals noted that § 431(4)(A),

the provision defining "political committee," defined it "solely in terms of 'expenditures' and 'contributions.' " *Id.* at 740. As the court of appeals understood the situation, the "major purpose test" as this Court had fashioned it was concerned *only* with "the constitutional concerns raised by *independent expenditures* . . . as distinguished from coordinated expenditures or direct contributions." *Id.* at 741.

The court of appeals decision is erroneous for several reasons. On a fundamental level, the court simply misread the actual language in *Buckley* and *MCFL*. The reading of those passages is ungrammatical and, therefore, highly implausible. Second, the court of appeals confounded the nomenclature of election law, confusing "independent expenditures" with "issue advocacy" expenditures. This mistake, it appears, led to the third and most serious error in the court's reasoning: because it focused only on "independent expenditures" rather than upon "issue advocacy" expenditures, the court of appeals turned a blind eye to the manner in which its interpretation of the "major purpose test" burdens issue advocacy. The court entirely failed to recognize that the broad definition of "political committee" which depended upon the making of "contributions" would have a massive deterrent effect on a group's exercise of its right to engage in "issue advocacy." As a result, the court of appeals enunciated an eviscerated version of the "major purpose test" which completely fails to protect issue advocacy.

A. Contrary to the court of appeals, the plain language that this Court used indicates that the "major purpose" at issue is that of the organization, not the disbursement.

In its discussion of this Court's development of the "major purpose test," the court of appeals stated that

> the [Supreme] Court did state in *Buckley* that the term political committee "need only encompass *organizations* that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." And this notion was

> repeated in *MCFL*: "an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.' "

101 F.3d at 741. The language employed by this Court and quoted by the court of appeals clearly – as a matter of grammar – indicates that the "major purpose" in question is that of the "organizations," not that of their expenditures; for the antecedent of the word "which" is obviously "organizations." Therefore, it cannot plausibly be maintained (as the court of appeals opines) that

> the better interpretation of this language . . . is that when an *organization* controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be *expenditures* within the statutory definition.

Id. at 742. On the contrary, the words this Court used in the "major purpose test" were carefully chosen and not ambiguous in the least. In dealing with *MCFL's* "major purpose" language, the court of appeals made a similar misstep. The court stated that

> the [Supreme] Court's analysis clearly distinguished between contributions and expenditures: "should MCFL's *independent spending* become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."

Id. (emphasis in original). By emphasizing the words "independent spending" the court obviously intended to demonstrate this Court's intention to protect "independent expenditures." But this is a highly strained and implausible reading. The plain meaning of the passage, on the contrary, is that: (1) it is the "*organization's* major purpose" which is at issue; and (2) that the way in which to determine whether an organization could be classified as a political committee was on the basis of its disbursements.

Therefore, the court of appeals was wrong to attempt to fashion an interpretation of the major purpose test which (even that court conceded) arguably departed from a "literal[ ] . . . read[ing]" of this Court's words. *See id.* at 741.

B. Contrary to the court of appeals, "independent expenditures" are not the most protected form of political speech, nor are they at issue in this case.

The court of appeals' focus on the major purpose of an organization's expenditures (as opposed to the major purpose of the organization itself) may have stemmed in part from the court's misunderstanding of the nomenclature in election law. For example, the lower court stated that

> [i]ndependent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption.

101 F.3d at 741. The court's use of the term "independent expenditure" in the preceding passage is simply wrong. For "independent expenditure" is a term of art in election law. It "means an expenditure by a person *expressly advocating the election or defeat of a clearly identified candidate* which is made without cooperation or consultation with any candidate. . . . " 2 U.S.C. § 431(17) (emphasis added). Thus, when the court below stated that independent expenditures are "closest to pure issue discussion," it was exactly wrong. On the contrary, "independent expenditures" are the *opposite* of "pure issue discussion." Moreover, while it is true that independent expenditures are entitled to a very high degree of First Amendment protection, they are not "the most protected form of political speech." 101 F.3d at 741. Rather, issue advocacy expenditures are afforded the most First Amendment protection. For while "independent expenditures" may be subject to reporting and disclosure requirements under the rule of *Buckley* and its progeny (*see* § 434(c) providing that independent expenditures by persons other than political committees are subject to disclosure), "issue advocacy" is

immune from such requirements. Indeed, as stated above, this Court has never permitted any restrictions on issue advocacy because of its vital role in representative government.

Although the court below appears to have recognized that the "major purpose test" was created to deal with a problem of constitutional dimension (*see Akins*, 101 F.3d at 743 n.11), it failed to focus on the problem which actually motivated this Court to develop the test, *i.e.*, the protection of issue advocacy. This is illustrated by the fact that (as has been discussed at length above) the portion of the *Buckley* opinion in which the major purpose test was first mentioned is one of the portions of the opinion devoted exclusively to the protection of *issue advocacy* as opposed to independent expenditures.

C. Contrary to the court of appeals, there is a serious constitutional problem in treating organizations such as AIPAC as "political committees"; the court of appeals' understanding of the "major purpose" test would have dire implications for the First Amendment protection of issue advocacy.

The opinion of the court below would result in subjecting issue advocacy groups to the full panoply of political committee disclosure requirements and contribution limits because of the fact that they had made a single $1,000 contribution to a candidate for federal office in a calendar year. Under the court of appeals' decision, a corporation which expends $10,000,000 for issue advocacy and makes a single $1,000 direct contribution to a candidate will have all of its issue advocacy severely burdened. As indicated above, the court of appeals did not come to grips with this, apparently because it believed that the evil to be avoided by the major purpose test was the infringing of "independent expenditures" rather than expenditures for "issue advocacy." The court made a simplistic distinction between "contributions" on the one hand and "expenditures" on the other. Since "expenditures" were generally entitled to more constitutional protection than "contributions," the court believed that this

> Court's rationale in *MCFL* and *Buckley* is simply inapplicable to the present case. There is no constitutional problem with applying § 431(4)(A) to AIPAC or to other organizations making campaign contributions.

101 F.3d at 742.

On the contrary, there is a grave constitutional problem with applying § 431(4)(A) to groups engaged primarily in issue advocacy. The decision below will have a chilling effect on the exercise of both the right of free speech and on the right of free association. The decision pits these two rights against each other. By exercising its right to political association through making a contribution, a group will be required to expose *all of its issue advocacy* to the burdens of disclosure. By exercising its right to unencumbered issue advocacy, it forfeits its right to make even a small amount of contributions to candidates. The upshot of this decision is clear: organizations which have an overall "political" purpose are put to a choice: either their activity must consist of one-hundred percent issue advocacy, or – if they make a single candidate contribution of $1,000 in a year – they must comply with the reporting requirements of FECA *as to all of their disbursements*, and their ability to make contributions will be severely limited as well.

D. Contrary to the court of appeals, the major purpose test examines disbursements in order to determine whether an entity is a "political committee."

The court below purported to look at the organization's purpose in order to determine whether an expenditure was subject to the statutory requirements. But that inquiry is exactly the reverse of what it ought to be. The "major purpose test" as properly understood, looks at its disbursements in order to determine whether an organization is a "political committee." Not only is that the view which (as shown above) is garnered from a natural reading of *Buckley* and *MCFL*, but it is the only view which makes any sense from a practical

point of view. For, under the lower court's view, one must first determine whether the group is a political committee, *i.e.*, whether its "major purpose" is "election-related." 101 F.3d at 742. Only then can one determine whether the group's disbursements are "*expenditures* within the statutory definition." *Id.* But this reasoning is circular: for how can one tell in the first instance what a group's "major purpose" is if not by examining the nature of its disbursements?

Moreover, the statutory scheme of the disclosure provisions does not discretely regulate only "contributions" or only "expenditures." Rather, the disclosure burdens are general. The question facing the person who wonders whether his organization must file disclosure statements under § 434 is straightforward: Are we a "political committee?" If the answer is yes, then the group must disclose the entire panoply of information required by § 434(b). In other words, due to the very structure of the statute, there is no reason to ask the question that the court of appeals posits as the preeminent question: Are our disbursements "expenditures" within the statutory definition? Any question concerning "expenditures" is purely subsidiary; it is only a way of determining what the "major purpose" of the group is, which question, in turn, is only important in order to determine whether the group is a "political committee" and thus, subject to the applicable disclosure requirements and contribution limits.

Even the court below would presumably agree that an organization which made *no* disbursements except for "issue advocacy" communications would be exempt from the requirements which pertain to "political committees." Thus, starting from the proper analytical point of departure, an issue advocacy organization is not, in the first instance, a political committee. What result obtains, however, when an organization which spends, for instance, $10,000,000 on issue advocacy decides that it wants to make a single $1,000 contribution to a candidate for federal office who shares the organization's view on an important issue? Under the view of the court of appeals, such an organization automatically becomes a "political committee." It must then comply with

the "full panoply of regulations which accompany status as a political committee. . . . " *MCFL*, 479 U.S. at 262.

Under the rule enunciated in *Buckley* and *MCFL*, such an organization was not a "political committee." Indeed, this Court specifically stated in *MCFL* that the organization there was *not* a political committee. *Id.* Nor did an organization become a political committee until it exceeded a threshold known as the "major purpose test." That test considered the actual behavior of the organization to see what kind of organization it was. If its major purpose (as deduced from its disbursements, whether they are considered "expenditures" or "contributions" under the Act) was to elect candidate(s), then it could constitutionally be subjected to the political committee disclosure requirements. *Id.* If not, then it was immune from those requirements. *Id.*

This rule has two related salutary benefits: (1) organizations will know how to structure there disbursements (at least to a great degree) so as to avoid being labelled as "political committees," and, therefore, their issue advocacy expenditures would not be chilled; and (2) the FEC and the courts will know how to discern when an organization was, for constitutional purposes, a "political committee." Under the rule announced below, on the contrary, these benefits are lost.

The court below disparages the common-sense interpretation of the "major purpose test" espoused here and by the FEC in the proceedings below. That interpretation, the court stated, would

> allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees.

101 F.3d at 743. According to the court, "[t]his would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of "political committee." *Id.* However, as demonstrated above, the interpretation which the court of appeals places on the 'major purpose test' " would have a severe chilling effect on a much more important value: free discussion of issues under the First Amendment – a value which undergirds our entire

system of government. For every organization which spends virtually all of its budget on issue advocacy but only a tiny portion on "contributions" would have *all* of its issue advocacy severely burdened by the political committee disclosure requirements and contribution limitations. This would result in self-censorship by such committees and, ultimately, in a reduction in the "quantity of expression," a result that the First Amendment will not tolerate. *Buckley*, 424 U.S. at 19.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL ELECTION COMMISSION,

Petitioner,

—v.—

JAMES E. AKINS, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan corporation with nearly 300,000 members dedicated to protecting the First Amendment rights of all persons, regardless of their partisan political interests or affiliations.

For the past twenty-five years, the ACLU has been deeply involved in the debate over government regulation of campaign speech. Indeed, the ACLU was centrally involved in the very first cases brought under the Federal Election Campaign Act (FECA). *See United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975). Those two cases helped fashion various doctrines to limit the impermissible reaches of FECA, including the "major purpose" test at issue in this case.

The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976). And, since *Buckley*, the ACLU has participated in numerous political speech cases decided by this Court, both as direct counsel and as *amicus curiae*. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

The American Israel Public Affairs Committee (AIPAC) is a nonprofit, nonpartisan, issue-oriented advocacy organization with more than 50,000 supporters nationwide. It has a budget of approximately $10 million and lobbies members of Congress and the Executive Branch, as well as the general public, to support its policy positions in favor of American support for and assistance to the government and people of Israel. *See Akins v. FEC*, 101 F.3d 731, 734 (D.C.Cir. 1997)(*en banc*).

Despite its acronym, AIPAC is not a "PAC" or "political action committee," as that term is commonly understood. The issue for this Court to resolve is whether AIPAC nonetheless can be regulated as though it were a "political committee" under the Federal Election Campaign Act because of the allegation that a small, though precisely undetermined, amount and proportion of its organizational resources were sporadically employed for campaign-related activities that benefitted certain federal candidates.[2]

This case commenced with the filing of an administrative complaint with the Federal Elections Commission

[2] The Federal Election Campaign Act deems a "political committee" any entity which receives contributions or makes expenditures of more than $1,000 in a year. *See* 2 U.S.C. §434(4)(A). Contributions and expenditures are defined as the giving or spending, donating or disbursing of, among other things, money, resources or "anything of value" "for the purpose of influencing any election for Federal office." *See* 2 U.S.C. §431(8)(A); 2 U.S.C. §431(9)(A). Thus, for example, if a full-time staff person of an issue-oriented organization spent no more than one week in an entire year on activities that plausibly could be deemed "for the purpose of influencing a Federal election," the *pro rata* salary and overhead for that one staff person alone would often exceed the minimal statutory threshold and, without more, transform the entire organization into a political committee.

(FEC) in January 1989 by numerous political adversaries of AIPAC, including a former congressman who claimed he had been defeated for re-election because of AIPAC-generated campaign contributions to his political opponent. *Id.* at 733-34. The complaint charged that "AIPAC used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meetings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates." *Id.* at 734.

Based on these allegations, the complainants contended that: (1) AIPAC was a "political committee" required to comply with a number of statutory mandates and restrictions; (2) AIPAC was "affiliated" with twenty-seven other "pro-Israel" political committees run or dominated by AIPAC officials and directors, thereby severely limiting their aggregate activity; (3) AIPAC had made illegal corporate campaign contributions and expenditures; and (4) AIPAC had failed to report its election related activity to the FEC.

Only the first of these allegations is still before the Court. After reviewing the report prepared by its General Counsel,[3] the FEC concluded that, although AIPAC "likely

[3] The General Counsel's report was based on an extensive record, including thousands of pages of internal AIPAC documents, memoranda, correspondence and communications. The bulk of the report considered whether AIPAC's supporters were properly deemed "members," so that any partisan activity directed to them would be statutorily privileged, and not constitute impermissible corporate contributions or expenditures. With the exception of AIPAC's Executive Committee, the General Counsel concluded that the answer to that question was no. Although endorsing that finding, the FEC decided to dismiss the charge in the exercise of prosecutorial discretion, because the question was "a close"

(continued...)

had made campaign contributions exceeding the $1,000 threshold . . . there was not probable cause to believe AIPAC was a political committee because its campaign-related activities were only a small portion of its overall activities and not its major purpose. The campaign activities were only conducted in support of its lobbying activities." *Id.* at 734.

Respondents then filed suit in the United States district court challenging the FEC's refusal to bring charges against AIPAC and disputing the FEC's use of the major purpose test. Agreeing with the FEC, the district court held that the major purpose test for determining whether a group is a "political committee" was an essential restraining feature of campaign finance law, based on the concern that "issue-oriented groups might [otherwise] be silenced by the burdensome requirements of the FECA." Pet.App. 87a.

On appeal, a divided panel affirmed. 66 F.3d 348 (D.C.Cir. 1995). Citing *Buckley v. Valeo*, 424 U.S. 1, and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, the majority concluded that any definition of a political committee that did not include the "major purpose" test would raise "grave constitutional difficulties." *Id.* at 354. As the majority explained:

> A broader construction of "political committee" would likely require advocacy groups to disclose their contributors even though the group is not principally involved in advancing the election or defeat of a candidate. This could raise a First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). It is our duty in the interpretation of a federal statute to avoid serious constitutional doubt.

Id. at 355-56. The panel also rejected respondents' contentions that the major purpose inquiry was designed to probe the purpose of the contribution or expenditure, not of the organization or group that made it, and that the rule only applies when groups make expenditures, not contributions.

The panel's decision was reversed *en banc*. 101 F.3d 730. Eschewing the moderation of the major purpose test, the *en banc* court concluded that if AIPAC -- or any comparable organization -- used as little as $1,001 of resources in an arguably partisan way, the entire organization could be deemed a "political committee" subject to all of the restrictions, regulations, disclosures and controls prescribed by FECA. The *en banc* court brushed aside this Court's ratification of the major purpose test in *Buckley* and *Massachusetts Citizens* on the grounds that those cases involved independent expenditures, not coordinated expenditures or direct contributions, and thus the narrowing concerns of those cases were inapplicable outside the expenditure context. The majority also reasoned that, under the major purpose formulation properly understood, it is "the purpose of the organization's disbursements, not of the organization itself, that is relevant." 101 F.3d at 743. Otherwise, the court below concluded, the FEC's interpretation of "political committee" would:

> allow a large organization to contribute substantial sums to campaign activity as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements im-

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[3] (...continued)
one. 101 F.3d at 734. The D.C. Circuit has since rejected the FEC's interpretation of the membership rule in another case. *See Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C.Cir. 1995).

> posed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee while another organization spending $1 million of its $100 million budget on campaign activity would not.

Id. Finally, the court rejected the Commission's suggestion that other statutory provisions would satisfy the government's legitimate interest in disclosure with less intrusion on First Amendment rights.

SUMMARY OF ARGUMENT

Under the holding below, any group or organization, no matter how large or small, no matter how nonpartisan or issue-oriented, which uses a *de minimis* amount of its resources in any way that could plausibly be characterized as "for the purpose of influencing any Federal election" is deemed a "political committee" and thereby subject to the extensive regulations imposed by the Federal Election Campaign Act, including disclosure of members, contributors, disbursements and activities. That ruling is fundamentally at odds with a central tenet of this Court's campaign finance jurisprudence: the imperative of protecting issue advocacy from campaign finance controls.

In furtherance of that goal, this Court's opinion in *Buckley* repeatedly stressed that campaign finance laws must be narrowly tailored to avoid "unnecessary abridgment of [First Amendment] freedoms." *E.g.*, 424 U.S. at 25, 64. Two particular restrictions adopted in *Buckley* are critical here. First, the *Buckley* Court ruled that the government's regulation of expenditures must be limited to "communications that in express terms advocate the election or defeat of a clearly identified candidate . . . ." *Id.* at 45. This "express advocacy" doctrine, which *Buckley* adopted "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons . . ." *Massachusetts Citizens*, 479 U.S. at 249, protects and safeguards issue-oriented speech. For two decades, it has played a crucial role in providing a bright line between permissible and impermissible government regulation.

Second, the *Buckley* Court concluded that the statutory definition of a "political committee" must also be narrowed to avoid constitutional difficulties. Specifically, the Court held that "[t]o fulfill the purposes of the Act [the disclosure and other obligations of political committees] need only [apply to] organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. As construed by the *Buckley* Court, therefore, the major purpose doctrine provides a second line of defense for issue advocacy groups to avoid improper and unwarranted campaign regulation. That doctrine protects and safeguards issue-oriented speakers.

The decision of the court of appeals in this case ignores both these essential elements of *Buckley*. Instead, it embraces a constitutionally overbroad definition of a "political committee" that is unnecessary to serve the government's asserted interest in providing the public with information regarding the source of political funding. That interest can be, and is, fully served by the disclosure obligations currently imposed upon the recipients of contributions by 2 U.S.C. §434(b)(3). Furthermore, the interest in public awareness of the source of coordinated or independent expenditures by groups that are not political committees is adequately satisfied by the disclosure requirements of 2 U.S.C. §434(c). Given these less restrictive alternatives, the far more expansive approach to campaign finance regulation endorsed by the court below fails the narrow tailoring requirement.

ARGUMENT

THE FIRST AMENDMENT'S CORE PROTECTIONS FOR ISSUE-ORIENTED ADVOCACY PRECLUDE TREATING NONPARTISAN GROUPS AS "POLITICAL COMMITTEES" AND THEREBY SUBJECTING THEM TO THE FEDERAL ELECTION CAMPAIGN ACT'S FULL PANOPLY OF REGULATIONS, DISCLOSURES AND CONTROLS

As this Court explained in *Buckley v. Valeo*, 424 U.S. at 15, the Federal Election Campaign Act's contribution and expenditure limitations operate "in an area of the most fundamental First Amendment activities."

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957) . . . "[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs . . . of course includ[ing] discussions of candidates . . . ." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Id. at 14-15.

The Court reaffirmed that principle most recently in *McIntyre v. Ohio Elections Commission*, 115 S.Ct. at 1518, when it struck down a ban on anonymous leafletting in issue-oriented campaigns as an unconstitutional restriction on "core" political speech. To protect that speech from the chilling effect of over-regulation, the *Buckley* Court fashioned the express advocacy doctrine as the primary mechanism for safeguarding issue-oriented speech from campaign finance controls.

Buckley also recognized that the First Amendment necessarily protects political association as a means of fostering such speech:

> The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas" . . . .

424 U.S. at 15 (citations omitted). To protect political associations from the chilling effect of over-regulation, the *Buckley* Court fashioned the major purpose test as the primary mechanism for safeguarding issue-oriented organizations from campaign finance controls.

Both the express advocacy test and the major purpose test thus reflect a single, overriding principle of First Amendment jurisprudence: "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the

restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Commission*, 115 S.Ct. at 1519. As first articulated in *Buckley* and later reaffirmed in *Massachusetts Citizens for Life*, the express advocacy and major purpose tests are constitutionally compelled limits on the otherwise fatal reach of FECA. Together, they mark the boundaries where permissible campaign finance regulation ends and unrestrained issue speech begins. The decision below obscures those boundaries and thereby undermines the First Amendment safeguards that this Court has so carefully erected.

A. The Express Advocacy Doctrine

One of the central elements of this Court's campaign finance jurisprudence has been the critical distinction between: (1) contributions and expenditures made by federal candidates, their campaigns and those who expressly advocate their election or defeat; and (2) all other issue advocacy and activity, even though it might influence the outcome of an election. This constitutional divide is compelled by the First Amendment and is built upon the concept that only "express advocacy" -- *i.e.*, an explicit call for the election or defeat of a particular candidate -- can be subject to regulation.

This is not to suggest that there is an always obvious distinction between issue speech and electoral advocacy. Quite the contrary, as this Court recognized in *Buckley*:

> [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues but campaigns themselves generate issues of public interest.

424 U.S. at 43. If any mention of a candidate in the context of discussion of an issue rendered the speaker or the speech subject to campaign finance controls, the consequences for "free discussion" would be intolerable and speakers would be compelled "to hedge and trim." *Id.*, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

Accordingly, while candidate-focused contributions, expenditures and express advocacy can be subject to regulation, all speech which does not "in express terms advocate the election or defeat of a clearly identified candidate" is outside the scope of permissible regulation. "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views," *Buckley*, 424 U.S. at 45, and they are also free from reporting and disclosure requirements. *Id.* at 79-80. *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. at 238.

The express advocacy doctrine thus provides powerful protection for issue-oriented speech by reducing the risk that issue advocacy will be subject to unconstitutional regulation. Its categorical approach is comparable to other landmark doctrines, like the "actual malice" concept of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or the "incitement test" of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Properly applied, it is a vital safeguard for issue organizations. The problem has been that enforcement actions under FECA have too often disregarded the bright line protections that the doctrine affords.

Indeed, the very first enforcement suit brought under the new Federal Election Campaign Act involved a handful

of dissenters who had published a two-page advertisement in The New York Times in May 1972 urging the impeachment of President Richard Nixon and praising the few members of Congress who supported that view. *United States v. National Committee for Impeachment*, 469 F.2d 1135. The United States filed suit claiming the advertisement was "for the purpose of influencing" the elections that year, thereby requiring the approval of all candidates that the ad might be construed as "on behalf of," and rendering the *ad hoc* group of ad sponsors a "political committee" subject to all of the law's new regulations and controls.

That view was rejected by the courts. Drawing the now-settled distinction between issue speech and express advocacy, the Second Circuit ruled that it would be an "abhorrent" and "intolerable" consequence if FECA allowed the government to "regulat[e] the expression of opinion on fundamental issues of the day." *Id.* at 1142. Additionally, the court held that the Act could only be applied to groups under the control of candidates or those making contributions or expenditures "the major purpose of which is the nomination or election of candidates." *Id.* at 1141. Thus were the seeds of both the express advocacy and major purpose tests planted.

The *Committee for Impeachment* suit was followed by *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041. That case arose when the ACLU sponsored an advertisement shortly before the 1972 elections criticizing the Nixon Administration's anti-busing policies and praising a member of Congress who had resisted the President on that issue. The court ruled that the portion of the Act which treated the ACLU advertisement as "on behalf of" the campaigns of members of Congress and "in derogation of" President Nixon's candidacy, "establishe[d] impermissible prior restraints, discourage[d] free and open discussion of matters of public concern and as such must be declared an unconsti-

tutional means of effectuating legislative goals." *Id.* at 1051. Turning to those portions of FECA that would have treated the ACLU as a "political committee," the *Jennings* court followed the lead of the Second Circuit and ruled that issue-oriented groups whose major purpose is not the election of candidates could not be covered by the Act:

> We are satisfied that by so constricting the reaches of Title III, the fears of constitutional infringements expressed by plaintiffs will be eliminated. They and other groups concerned with the open discourse of views on prominent national issues may, under both this ruling and that of the Second Circuit, comfortably continue to exercise these rights and feel secure that by so doing so their associational rights will not be encroached upon.

Id. at 1057.

These assurances, unfortunately, were short-lived. Only one year later, the 1974 amendments to FECA included a provision, 2 U.S.C. §437a, designed to regulate issue-oriented groups in ways that *Jennings* and *Committee for Impeachment* had ruled impermissible.[4] That provision was

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[4] 2 U.S.C. §437a provided, in pertinent part:

> Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidates who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidates or to with-

(continued...)

challenged as part of the *Buckley* litigation. The D.C. Circuit, which upheld every other provision of the new law, unanimously struck down §437a as an unconstitutional regulation of nonpartisan political speech. As the circuit court recognized, the broad statutory language of §437a prohibited even the discussion of campaign issues and candidate voting records, which are "vital and indispensable to a free society and an informed electorate." 519 F.2d. 821, 873 (D.C.Cir. 1975).[5]

In the years since *Buckley*, the express advocacy doctrine has been an indispensable bulwark against overzealous efforts to regulate core political speech. From *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980)(*en banc*)(finding the Commission's enforcement suit against a tax protest group to be "totally meritless"), to *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997) (invalidating FEC regulations on limiting voter guides), the government has suffered "a string of losses in cases between the FEC and issue advocacy groups over the meaning of the phrase 'express advocacy' and the permissible scope of the FEC's regulatory authority over . . . political speech." *Federal Election Commission v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997)(authorizing an award of fees and costs against the Commission for bringing enforcement proceedings against an issue group in clear violation of this Court's "express advocacy" doctrine).

We detail this history not to question the good faith enforcement in any of these proceedings, but because the persistent and relentless campaign to test and diminish the express advocacy doctrine has an impact on the world of issue-oriented organizations and the way that they speak about and relate to public officials who are also candidates for federal elective office. "[T]he value of a sword of Damocles is not that it drops, but that it hangs." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974)(Marshall, J., dissenting).

These efforts to dilute the express advocacy test make the major purpose test even more important for issue advocacy groups that wish to criticize political figures without placing their entire organizations at risk of being deemed political committees. The decision below obliterates that safeguard, and thus poses a serious threat to the issue advocacy of such groups.

B. The Major Purpose Test

The major purpose test was forged in the same crucible as the express advocacy doctrine. The latter was fashioned to protect issue-oriented speech from being treated as partisan advocacy unless it meets a bright line test; the former protects issue-oriented speakers from being treated as political committees even if an incidental amount of their advocacy or activity can be characterized as campaign related or partisan. It is a second line of defense against official encroachment on issue organizations. Just like the two-pronged test of incitement in *Brandenburg v. Ohio*, 395 U.S. 444, requiring both prohibited content and triggering context, the two features here combine to protect issue advocacy. Both features must be satisfied before a group can be subject to all the rigors and regulations of a "political committee."

The court below nevertheless found that the major purpose test was inapplicable for two reasons. First, in the view of the court below, the test focuses on the major pur-

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[4] (...continued)
hold their votes from such candidate shall file reports with the Commission as if such person were a political committee.

[5] Section 437a has since been repealed. Pub.L.No. 94-283, Title I, §105, 90 Stat. 481 (1976).

pose of the contribution or expenditure, not the organization making it. Second, the court below held that the major purpose test is only triggered by government attempts to regulate expenditures, not contributions. Neither argument withstands scrutiny.

1. The Major Purpose Test Turns On The Nature Of The Organization, Not The Nature Of The Expenditure Or Contribution

The major purpose test originated in *United States v. National Committee for Impeachment*, *ACLU v. Jennings*, and the *en banc* decision in *Buckley v. Valeo*. Those cases made clear that the concept was primarily designed to define and limit the term "political committee" by focusing on the speaker, not to define and limit the terms "contribution" or "expenditure" by focusing on the speech. The express advocacy concept would come to serve that latter limiting function.

Thus, in *Impeachment Committee*, the Second Circuit not only ruled that the content of the impeachment advertisement could not serve as the basis for campaign regulation, but also that the Act's "political committee" definitions could only apply "to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates . . . ." even though, "under this interpretation, enforcement of the Act may be made somewhat more burdensome, as the supervisory officials will be forced to glean the principal or major purpose of the organizations they seek to have comply with the Act." 469 F.2d at 1141.

In *ACLU v. Jennings*, the court again separated the question of the kind of speech from the question of the nature of the speaker when it adopted the Second Circuit's

definition of a political committee. The provision controlling media expenditures "on behalf of" a candidate was ruled an unconstitutional prior restraint, while the issue group's concern that an open-ended definition of "political committee" might ensnare its nonpartisan issue advocacy was addressed as the Second Circuit had done. Specifically, the *Jennings* court limited the reach of the political committee concept by holding: "(1) the determinative phrase 'made for the purpose of influencing,' is to include only those expenditures made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents,' and (2) Title III is applicable only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates.'" 366 F.Supp. at 1057, quoting *National Committee for Impeachment*, 469 F.2d at 1141.

By the time the matter was taken up by the *en banc* circuit court in *Buckley*, it was virtually settled law that "a group will be considered a political committee only if it makes its expenditures under the control or with the consent of a candidate, or if the major purpose of its expenditures is the nomination or election of candidates. Nonpartisan issue groups are therefore not covered." 519 F.2d at 864.

These cases formed the acknowledged backdrop for this Court's adoption of the major purpose test as a constitutionally indispensable limit on the otherwise impermissible reach of the "political committee" designation when applied to nonpartisan and noncampaign groups. The *Buckley* Court was animated by three key concerns: First, the extremely broad reach of the term "political committee," which the Act defines in terms of the problematically vague notion of activities undertaken "for the purpose of . . . influencing" an election; second, the extraordinary series of burdens imposed

on those entities deemed "political committees;"[6] and third,

[6] The Court described the statutory requirements as follows:

> Each political committee is required to register with the [Federal Election] Commission, §433, and to keep detailed records of both contributions and expenditures, §§432(c), (d). These records must include the name and address of everyone making a contribution in excess of $10, along with the date and amount of the contribution. If a person's contributions aggregate more than $100, his occupation and principal place of business are also to be included. §432(c)(2). These files are subject to periodic audits and field investigations by the Commission. §438(a)(8).
>
> Each committee and each candidate also is required to file quarterly reports. §434(a). The reports are to contain detailed financial information, including the full name, mailing address, occupation, and principal place of business of each person who has contributed over $100 in a calendar year, as well as the amount and date of the contributions. §434(b). They are to be made available by the Commission "for public inspection and copying." §438(a)(4). Every candidate for federal office is required to designate a "principal campaign committee," which is to receive reports of contributions and expenditures made on the candidates's behalf from other political committees and to compile and file these reports, together with its own statements, with the Commission. §432(f).
>
> Every individual or group, other than a political committee or candidate, who makes "contributions" or "expenditures" of over $100 in a calendar year "other than by contribution to a political committee or candidate" is required to file a statement with the Commission. §434(e). Any violation of these recordkeeping and reporting provisions is punishable by a fine of not more than $1,000 or a prison term of not more than a year, or both. §441(a).

424 U.S. at 63-64. A decade later, in *FEC v. Massachusetts Citizens for Life*, the Court would describe in even greater detail the more specific financial and accounting requirements imposed on political committees. *See* 479 U.S. at 253-54. The only significant change in these require-

(continued...)

the fact that the Act mandates compelled disclosure of contributors and supporters.

Using the congressional focus on "campaign-oriented spending" as its touchstone, the *Buckley* Court noted that FECA's broad statutory definition of a "political committee" had the dangerous potential "for encompassing both issue discussion and advocacy of a political result." 424 U.S. at 79. In crucial language, the Court continued:

> The general requirement that "political committees" and candidates disclose their expenditures could raise [serious] vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" or "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly.[106] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

[106] At least two lower courts, seeking to avoid questions of unconstitutionality, have construed the disclosure

[6] (...continued)
ments since this Court described them in *Buckley* was that the recordkeeping and reporting thresholds for contributors were raised from $10 and $100 to $50 and $200, respectively.

> requirements imposed on "political committees" by §434(a) to be nonapplicable to nonpartisan organizations. *United States v. National Comm. for Impeachment*, 469 F.2d at 1139-1142; *American Civil Liberties Union v. Jennings*, 366 F.Supp. at 1055-1057. *See also* 171 U.S. App. D.C., at 214 no. 112, 519 F.2d at 863 n.112.

In the very next paragraph, the Court further protected such nonpartisan issue groups from even the less demanding reporting requirements imposed by §434(e) on groups other than "political committees," *i.e.*, groups whose major purpose is *not* the nomination or election of a candidate. The Court did so by holding that §434(e)'s requirements only applied to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80 (footnote omitted). The Court in *Buckley* thus created a clear and sensible regime for protecting nonpartisan issue advocacy groups from government overreaching and its chilling effect on First Amendment expression.

The soundness of this approach was reaffirmed a decade later in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, where the Court revisited the regulation of issue advocacy groups whose major purpose is not the partisan election of candidates. In four separate places the Court made it clear that the major purpose test focuses on the nature of the organization and not, as the lower court erroneously held in this case, on particular contributions or expenditures.

Upholding the right of an incorporated anti-abortion group to engage in what this Court held was express advocacy, the Court first noted that if the group were not incorporated yet made certain express advocacy "expenditures," the major purpose test would still protect the group from being regulated as a political committee. Its only obligation would be to comply with the less burdensome requirements of §434(c)(formerly 434(e)): "All unincorporated organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these regulations." 479 U.S. at 252-53.

Second, the Court highlighted in a footnote, *id.* at 252 n.6, the fact that MCFL was not primarily a partisan political organization:

> In *Buckley* . . . this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. It is undisputed on this record that MCFL fits neither of these descriptions. Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

Third, the Court noted with disapproval that the FEC's effort to equate ideological corporations with for-profit corporations under the Act would mean that "all MCFL independent expenditure activity is, as a result, regulated as though the organizations's major purpose is to further the election of candidates." *Id.* at 253.

Finally, the Court concluded that the government's legitimate interests could be adequately served by subjecting MCFL to the more targeted disclosure requirements of §434(c), at least so long as its express advocacy remained only an incidental undertaking and not the organization's major purpose:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity,

> the corporation would be classified as a political committee. *See Buckley*, 424 U.S. at 79. As such it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.

479 U.S. at 262.[7]

Buckley and *Massachusetts Citizens for Life* make clear that the major purpose test was adopted by this Court to protect issue organizations that are not political committees from being treated as if they were. The suggestion below that the reason for the major purpose doctrine is simply to create a presumption that all spending by a candidate committee or partisan organization is a covered "expenditure" misreads and indeed trivializes the protective doctrine this Court fashioned and the background that motivated the Court's action. That doctrine was fashioned to protect issue-oriented groups from being subjected to regulation and control as political committees, not to insure full reporting by candidate-authorized political committees.[8]

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[7] That discussion is particularly significant since the Court found that MCFL had made approximately $10,000 in express advocacy independent expenditures, yet ruled that it could not be treated as a political committee because such partisan communications were not the major purpose of the organization.

[8] The concept of inquiring whether the major purpose of making a contribution or expenditure -- acts which are themselves defined by whether they have a political purpose -- is political has a strongly tautological and elusive quality as well. By contrast, inquiring into the major pur- (continued...)

The regulatory regime resulting from this Court's doctrines is one which well serves both the interests of the government in disclosure of campaign funding and the interests of issue groups in unfettered commentary and criticism on public issues and public officials. Under that structure, issue groups have various options. They can forego any commentary or activity that would constitute "express advocacy" of specific electoral outcomes and be totally free to use their resources without limit or regulation to communicate their message. Alternatively, they may devote a relatively small portion of their resources to express advocacy and only be required to disclose the amounts tailored to and reflecting their actual partisan activity. Moreover, those groups that take the corporate form and do not wish to be treated as political committees can seek an "MCFL exemption" for ideological corporations.

2. The Major Purpose Test Does Not Turn On The Distinction Between Expenditures and Contributions

In rejecting the application of the major purpose test here, the court below placed wooden reliance on the distinction between contributions and expenditures. However, once it is understood that the major purpose test applies to organizations, not to contributions or expenditures, the court's effort to distinguish between contributions and ex-

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[8] (...continued)
pose of an organization which has made an expenditure or a contribution is a much more familiar and accessible inquiry. One court applying the major purpose test has suggested that "the organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates. *See, e.g., FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986)." *Federal Election Commission v. Gopac, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996).

penditures makes little sense. As just described, the function of the major purpose test is to protect issue advocacy from the chilling effect of the comprehensive regulatory scheme that accompanies political committee status. The potency of that chilling effect does not depend on whether the designation as a political committee is triggered by incidental contributions or incidental expenditures. In either event, the constitutional infirmity lies in the fact that constitutionally protected expression is discouraged. In short, the regulatory scheme envisaged by the court of appeals is one in which the tail wags the dog. When dealing with First Amendment speech, the government must regulate with greater precision. *NAACP v. Button*, 371 U.S. 415 (1963).

To be sure, an organization can insulate its issue advocacy from government regulation by refraining from any covered expenditures or contributions in excess of $1,000. But it is hardly a sufficient answer to say that one constitutional right can be rescued by sacrificing another. *Cf. Sherbert v. Verner*, 374 U.S. 398 (1963)(government benefits cannot be conditioned on the waiver of constitutional rights). Even the court below recognized that the First Amendment price was too high to pay in the case of incidental expenditures. It is also too high to pay when incidental contributions are at stake.

Contributions may be subject to greater regulation than expenditures under this Court's precedents, but they are still a form of political activity protected by the First Amendment. By abandoning the major purpose test, the decision below forces organizations to forego otherwise permissible political contributions or accept otherwise impermissible restrictions on issue advocacy. That compelled choice is unconstitutional, especially given the existence of other, less restrictive regulations that already govern contributions by organizations that do not meet the major purpose test. *See* pp.27-30, *infra*.

Moreover, the chilling effect of a regulatory scheme that does not include the major purpose test is magnified in this context because the interpretation of what constitutes a contribution is itself such a malleable one. The statute at almost every point defines contributions and expenditures in virtually the same language, and prohibitions on, for example, corporate contributions or expenditures are written in tandem. *See* 2 U.S.C. §441b(a). It is this Court's decisions that have determined whether activities are properly treated as one or the other and then properly subject to regulation for different purposes.

Contributions directly given to candidates are most subject to control because of the Court's conclusion that they involve second-hand speech but primary possibilities for the actuality or appearance of corruption. Expenditures which are in fact coordinated with candidates are regulated as though they were contributions because, by virtue of their prearranged nature they take the place of, pose the same concerns as and, if in excess of the permitted amounts, could be prohibited like contributions. They are surrogate contributions. Independent expenditures for express advocacy are at the core of the First Amendment and are different from direct contributions to candidates because they embody direct rather than proxy speech and because they involve fewer of the concerns with the appearance or reality of corruption. And, of course, pure issue speech is beyond the pale of any regulation.

The isolated instances of arguably campaign-related activity in this case are difficult to place on the spectrum because they are a hybrid of different factors. There were allegations of some campaign-related contacts and communications and discussion between AIPAC staffers and candidates or their representatives, after which there were communications to certain AIPAC members who thereafter, on their own, apparently made contributions to those candi-

dates. AIPAC disputed that its staff members put candidate fundraisers and AIPAC members in touch with each other. AIPAC took the position that, since virtually none of those post-contact communications involved express advocacy of those candidates, they could not be deemed contributions or expenditures. The FEC Counsel disagreed, ruling that once AIPAC had any conversation or discussion with candidates about their campaigns, "any subsequent activity or communication AIPAC undertakes regarding that candidate that goes beyond its members would have to be viewed as activity or communications undertaken in coordination or consultation or in concert with the candidate's campaign." General Counsel's Report at 24. This characterization had two consequences. First, the express advocacy test became irrelevant. Second, the court of appeals later ruled that the major purpose test was inapplicable because AIPAC activities were "in-kind contributions," not protected "expenditures."

Issue groups cannot function effectively in an environment where their contacts with elected officials about campaign-related issues ("Has your pro-choice stance hurt you in your district"?) bars them from any future issue advocacy relating to that candidate ("Smith is pro-choice") because this non-express advocacy will be viewed as a coordinated expenditure, hence a contribution, and thus not subject to the major purpose test. Issue groups cannot easily survive in an environment with rules that so easily presume that inquiry and discussion have become collaboration and coordination.[9]

In this core area of issue advocacy, government must demonstrate much more precision of regulation so that speakers do not "steer far wider of the unlawful zone."

[9] *See Clifton v. FEC*, 114 F.2d 1309 (invalidating FEC requirements that contacts between issue organizations and candidates with respect to voter guide information be in writing and not oral).

Speiser v. Randall, 357 U.S. 513, 526 (1958). That is why the *en banc* court's approach to the distinction between contributions and expenditures poses grave perils to issue organizations.

C. The Government's Legitimate Interests In This Case Can Be Served Through More Narrowly Tailored Means

As construed by the *en banc* court, the term "political committee" fails strict scrutiny because it lacks the required close fit "between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64. Indeed, the fact that the government has appealed the decision below should be dispositive of the claim that it is necessary to achieve the government's interests.

This Court has been sensitive to two kinds of burdens on core political expression in the campaign finance cases: "the chilling effect of reporting and disclosure requirements on an organizations' contributors," and "the potential burden of disclosure on a group's own speech." *Massachusetts Citizens for Life*, 479 U.S. at 265-66 (O'Connor, J., concurring). *See also Buckley*, 424 U.S. at 64. The burdens of regulation and disclosure visited upon "political committees" are extensive, *see* n.6, *supra*. For established groups like AIPAC, they can create significant deterrents to engaging in any discussion or advocacy that might cross the line. For smaller and less well-established organizations, the burdens of political committee regulation can be crushing, as this Court recognized in *Massachusetts Citizens for Life*.

For all groups, the burdens of disclosure and identification on individual and associational privacy and members rights can be substantial. *See NAACP v. Alabama*, 357 U.S. 449 (1958); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334. People who thought they were contributing to a

cause may be distressed to find the government will deem them to have been contributing to a candidate and subject to public disclosure as a result. To visit such consequences on cause organizations that engage, incidentally and indirectly and with an insubstantial amount or proportion of their resources, in activities that might be deemed in some way to be "campaign-related," is a disproportionate and constitutionally indefensible response.[10]

Moreover, this burden is unnecessary to achieve the government's interest in disclosing the sources of campaign-related funding. As this Court has previously observed, the major purpose test leaves ample and properly tailored remedies available to secure those compelling interests in ways less burdensome for core First Amendment rights. Section 434(c) is the major statutory mechanism for disclosure by groups and individuals that are not candidates or political committees when: "(1) they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee; and (2) they make expenditures for

[10] In this regard, the situation is parallel to in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), where this Court held unconstitutional a congressional statute which demanded that any public broadcasting station which received even the most minimal amount of federal funding must totally refrain from any engaging in any "editorializing." Thus, a station which got 1% of its funding from federal sources was barred from using any of the remaining 99% of its own resources for the most strongly protected speech. Here, too, under the approach of the court below, any modest issue-oriented organization which uses the most minimal amount of its resources in a "campaign-related" way, would be forced to register, restructure, report and disclose its entire undertaking. See also *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995)(invalidating as a "crudely crafted burden" on First Amendment activities a Congressional statute prohibiting almost all federal employees from receiving compensation for making any speeches or writing any articles).

communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. at 80.

In addition, candidates, political committees and other beneficiaries or recipients of "contributions" or "expenditures" are subjected to significant reporting and disclosure requirements. 2 U.S.C. §434(b)(3). Unlike the all-or-nothing approach adopted by the court below, such measures are "directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Buckley v. Valeo*, 424 U.S. at 80. As the Court explained in *Massachusetts Citizens for Life*,

> an independent expenditure of as little as $250 . . . will trigger the disclosure provisions of section 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committees under the Act.

479 U.S. at 262. If a group reaches the point where such partisan actions become its major purpose, the constitutional balance shifts, and the state's interest in assuring fuller accountability is entitled to greater weight.

The decision below rejects this careful weighing of interests. Instead, it endorses a regulatory scheme that will inevitably lead to the "unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25. This Court should not sanction that result.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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No. 96-1590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF COMMON CAUSE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Common Cause submits this brief *amicus curiae* with the consent of the parties.[1] Common Cause is a non-profit

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[1] Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, Common Cause states that the brief in its entirety was drafted by *amicus curiae* and its counsel. No monetary contribution toward the preparation or submission of this brief was made

membership organization with approximately 250,000 dues-paying members in all fifty States and the District of Columbia. Common Cause promotes, on a non-partisan basis, its members' interests in open, honest, and accountable government and political representation. Common Cause seeks to achieve this objective by making government more responsive to citizens through government and election reform. Common Cause frequently has participated in litigation seeking to protect the integrity of the electoral process. It has filed briefs as a party or *amicus curiae* in numerous cases before this Court and other federal and state courts concerning the constitutionality and implementation of federal and state election laws.

As an integral part of its goal of enhancing accountability and electoral reform, Common Cause has dedicated itself since the early 1970s, following the Watergate scandal, to promoting full disclosure of campaign finance activities and compliance with the Federal Election Campaign Act of 1971 ("FECA" or "Act"). By publicizing the sources, uses, and dollar amounts of political contributions and expenditures, as well as violations of the campaign laws, Common Cause seeks to empower its members and other citizens to make informed electoral decisions. In addition, by publicizing the campaign finance practices of political entities nationwide, Common Cause and its members seek to energize support for electoral reform.

This Court's decision on the standing issue could have a profound impact on Common Cause's ability as an organization to provide its members and the general public with information concerning the role of money in federal elections and the effectiveness of the FECA. To ensure that

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by any person or entity other than *amicus curiae*, its members, or its counsel.

information about campaign finance issues, which is necessary to an informed electorate, is fully disclosed as required by law, voters and organizations like Common Cause must be able not only to file complaints with the FEC, but also to seek judicial review when the FEC has failed to enforce the FECA.

Congress provided in the FECA that "aggrieved" complainants may challenge FEC rulings in such circumstances. However, because of lower-court confusion about the appropriate standards for establishing standing and hypertechnical applications of those standards, Common Cause has faced, and has a significant future risk of facing, inconsistent and unduly restrictive standing determinations. *See, e.g., Common Cause v. Federal Election Comm'n*, 108 F.3d 413 (D.C. Cir. 1997). Common Cause accordingly requests the Court to use this case to make clear that organizations such as Common Cause (and their voter members) have standing to sue to vindicate the rights of their members to information required to be disclosed under the FECA.

Thus, complainants who are aggrieved because the FEC has failed to act on or has dismissed their administrative complaint in a manner contrary to law should be held to have standing both where their administrative and judicial complaints allege (1) violations of the disclosure and reporting provisions of the FECA, such as where a candidate simply fails to report contributions, and (2) violations of other provisions of the FECA that do not directly require disclosure, but which have the consequence of triggering a separate reporting and disclosure obligation (and violation). The present case, like most cases of consequence, falls into this latter category. Respondents alleged that AIPAC made campaign contributions and expenditures in excess of $1,000,

therefore qualifying it as a political committee under the FECA, but that it failed to register as a political committee. Since the American Israel Public Affairs Committee ("AIPAC") did not treat itself as a political committee, it failed to make the disclosures required of political committees. *See Akins v. Federal Election Comm'n*, 101 F.3d 731, 734 (D.C. Cir. 1996) (*en banc*). The effect on voters and organizations such as Common Cause of a failure to enforce is the same in both situations: deprivation of campaign finance information useful in evaluating candidates and in monitoring elected officials.

INTRODUCTION AND SUMMARY OF ARGUMENT

A principal purpose of the FECA was to provide the public with access to information on political contributions and expenditures so that the public would know which candidates were receiving what and from whom. As this Court has explained, disclosure of this information serves at least three substantial governmental interests: (1) enhancing the ability of the electorate to evaluate candidates for federal office,[2] (2) deterring corruption and the appearance of corruption by making large contributions and expenditures

[2] As the Court elaborated:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley v. Valeo, 424 U.S. 1, 66-67 (1976) (*quoting* H.R. Rep. No. 92-564, at 4 (1971)).

publicly known,[3] and (3) providing data that will assist in detecting other violations of the campaign laws. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976). Reflecting the importance of these objectives, Congress mandated that all disclosure filings be made available for public inspection within 48 hours of receipt. *See* 2 U.S.C. §§ 432(g)(4), 438(a)(4), 439(b)(3). In addition, Congress established in the FECA a mechanism intended (among other things) to ensure compliance with both the disclosure provisions of the FECA and other FECA provisions that impact disclosure obligations.

Congress vested the Federal Election Commission ("FEC" or "Commission") with principal responsibility for civil enforcement under the FECA. *See* 2 U.S.C. §§ 437d(e), 437g. At the same time, Congress recognized that the involvement of private parties acting both to protect their own interests and as private attorneys general would be necessary to effectuate the purposes of the FECA.

Congress therefore adopted a statutory structure under which private parties serve an essential, supplemental enforcement role. In particular, Congress provided that "any person" who believes a violation of the reporting or other requirements of the FECA has occurred may bring that violation to the attention of the FEC by filing a complaint. *See* 2 U.S.C. § 437g(a)(1). In the first instance, the FEC has responsibility for investigating the alleged violation. *See* 2 U.S.C. §§ 437g(a)(1)-(7). Congress further provided that if the FEC dismisses the complaint or fails to act on it in a timely manner, the complainant may file a petition for review

[3] The Court further noted that publicity about significant contributions also allows the public to better monitor whether post-election preferences or special favors are given to these contributors. *Id.* at 67.

with the District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). If the court determines on review that the dismissal or the FEC's failure to act was "contrary to law," the court may enter an order directing the FEC to conform with the Court's ruling. 2 U.S.C. § 437g(a)(8)(C). If the FEC fails to do so within 30 days, the complainant may bring a civil action, in the complainant's own name, to remedy the violation charged in the complaint. *Id.*

Congress' intent that the FECA provide broad standing to challenge non-enforcement of the Act is clear from the structure and language of the Act's enforcement provisions. The fundamental question is the degree to which the broad standing intended by Congress is consistent with Article III. It is, for a number of independent reasons.

First, voters who allege that they have been denied information relevant to their electoral decision, either through violations of reporting and disclosure provisions or violations of other provisions of the Act, enforcement of which triggers reporting and disclosure obligations, have standing to seek judicial review under Section 437g(a)(8)(A). One of the primary purposes of the FECA is to provide voters with information Congress has determined is integral to the electoral decision. A voter who has been denied that information has been injured in a personal and concrete way by being deprived of something of utility and value to him or her in making an electoral decision.

Second, Respondents suffered injury sufficient to establish standing because the nondisclosure of information about AIPAC impeded their ability to conduct their daily operations. As the original panel of the D.C. Circuit concluded, the failure to disclose information about AIPAC's contributors and expenditures impaired Respondents' ability to influence and inform policymakers and the public on issues

concerning Israel. *See Akins v. Federal Election Comm'n*, 66 F.3d 348, 350-51 (D.C. Cir. 1995), *vacated*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*).

Third, the FECA was intended to provide the public generally with information Congress concluded was useful both to evaluate candidates in the electoral process and to monitor and evaluate elected officials in the conduct of their duties. *See Buckley*, 424 U.S. at 66-68. As with statutes such as the Freedom of Information Act ("FOIA") and the Federal Advisory Committee Act ("FACA"), the FECA creates a right to information required to be disclosed under the Act. The denial of a claimant's access to information to which he or she is entitled under the Act is an injury sufficient in and of itself to establish standing.

Fourth, the FECA creates a procedural right on behalf of an individual who has properly filed an FEC complaint to have that complaint addressed in a timely fashion and not dismissed on grounds that are arbitrary or capricious or otherwise contrary to law. Congress has the power to establish an administrative process to handle a complaint, to establish procedures and substantive standards to be followed in that administrative process, and to provide a mechanism for judicial review of that process. Here, Congress has done so by providing that a complainant "aggrieved" by the agency's conduct of the administrative process may seek judicial review of the agency's conduct with regard to his or her particular claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-78 (1992), is not to the contrary.

ARGUMENT

THIS COURT SHOULD AFFIRM RESPONDENTS' STANDING TO CHALLENGE THE FEC'S DISMISSAL OF THEIR ADMINISTRATIVE COMPLAINT

Under Article III of the Constitution, the jurisdiction of the federal courts is limited to "Cases" or "Controversies." U.S. Const. art. III, § 2. One of the elements of the case-or-controversy requirement is standing. *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997). To establish Article III standing, a party generally must demonstrate three elements:

> [1] that he has suffered "injury in fact," [2] that the injury is "fairly traceable" to the actions of the defendant, and [3] that the injury will likely be redressed by a favorable decision.

Bennett v. Spear, 117 S. Ct. 1154, 1161 (1997) (citation omitted). In addition, a party must satisfy judicially imposed prudential requirements for standing, unless Congress has abrogated those requirements. *Id.* Respondents, who alleged that they were deprived of information to which they have a right under the FECA, satisfy all the elements of standing.

A. Respondents Have Established Standing as Voters

1. Respondents Suffered Article III Injury in Fact Because They Were Deprived of Information Useful to Them as Voters

In holding "that [Respondents] have standing as *affected* voters," *Akins v. Federal Election Comm'n*, 101 F.3d 731, 738 (D.C. Cir. 1996) (*en banc*) (emphasis in original), the court of appeals made two, distinct findings regarding the injury-in-fact prong of the Article III standing inquiry. First, the court held that a voter deprived of information relevant to his or her vote suffers an injury in fact. *Id.* at 737. Second,

the court held that under the circumstances of the case it was fair and appropriate to conclude that AIPAC had made contributions in elections in which one or more of the respondents voted. *Id.* at 737-38. This Court should affirm both holdings.

Petitioner does not take issue with the conclusion of the court of appeals that a voter deprived of useful information in connection with an election in which he or she votes has suffered a particularized, concrete injury. *See* Petitioner's Br. at 28. Nor, reasonably, could Petitioner contest this conclusion. In enacting the FECA, Congress determined that the information to be disclosed is important to the electoral decisionmaking process and that voters have a right to that information. *See Buckley*, 424 U.S. at 66-67. When information is withheld from a voter in violation of the requirements of the FECA, the voter is deprived of information that is useful, and therefore of value to the voter, in his or her personalized evaluation of the candidates.

Instead, Petitioner takes issue with the court of appeals' holding that it would presume that contributions and expenditures were made by AIPAC in elections in which Respondents voted. *See Akins*, 101 F.3d at 738. Petitioner does so in something of a peculiar way, however. Rather than addressing the validity of the court's presumption that the elections in which Respondents participated corresponded with the contributions and expenditures AIPAC made,[4]

[4] The approach of the court of appeals is a reasonable and appropriate response to the circumstances of the case. It would be an unfair obstacle to standing to require the Respondents to prove AIPAC's contributions and expenditures when that "is precisely the information of which [Respondents] claim they have been deprived." *Akins*, 101 F.3d at 737-38. It would, moreover, create perverse incentives if the more successful politicians, parties, and PACs are at hiding their expenditures from the public, the less likely it is that there will be standing. If the

Petitioner recasts the court's holding as a finding that injury in fact is established if AIPAC "*may have made* contributions" in the elections in which Respondents voted. *See* Petitioner's Br. at 28 (emphasis in original).

To the extent Petitioner is suggesting that the court of appeals did not think a direct connection between the election and the payment was required to establish standing, Petitioner is mistaken. The court of appeals was explicit in holding that such a direct connection was required. *See Akins*, 101 F.3d at 737 ("[I]t would not be enough for standing in this case for [Respondents] to assert only that they were voters, for [Respondents] would not be injured as voters if AIPAC's activities were unrelated to any election in which they voted.").

Having constructed its mistaken premise, Petitioner then argues that since the court's analysis would apply to all registered voters, the harm at issue is a "generalized grievance" that does not satisfy the requirements of Article III standing. *Id.* But Petitioner's focus on the number of elections, or voters affected, is misguided. The standing analysis is the same whether one election is at issue, or hundreds throughout the nation; the injury does not become less personal and concrete because a large class of people also have suffered an injury. To the contrary, as this Court has previously held, "[t]he fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure . . . does not lessen [the] asserted

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Court concludes that such a presumption cannot stand, then it should remand the matter to the district court to allow Respondents to establish the factual basis for a finding that AIPAC made contributions and expenditures in elections in which they voted.

injury." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449-50 (1989).[5]

Rather, a "generalized grievance" is characterized less by the size of the group injured than by the "the diffuse and abstract nature of the injury." *Akins*, 101 F.3d at 737; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-76 (1992) (discussing cases). The injury alleged here is not the amorphous or abstract right to good governance usually at issue in the "generalized grievance" cases, but the personal concrete injury of persons deprived of information of value to them in making their respective, personal electoral decisions. *See, e.g.*, *Public Citizen*, 491 U.S. at 449-50.

2. The Denial of Information to the Respondents Is "Fairly Traceable" to the FEC's Failure To Require Disclosure and Would Likely Be "Redressed" by an Order Entered by the Court

The injury Respondents suffered is "fairly traceable" to the actions of the FEC. Respondents' failure to obtain information about AIPAC contributions and expenditures is a direct result of FEC's determination that AIPAC is not a political committee, and therefore under no obligation to make the disclosures at issue. Not surprisingly, Petitioner does not challenge this determination. As the court of appeals noted, a contrary argument "would stretch causation to its breaking point; no one would have standing to challenge the Commission's determination, or for that matter,

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[5] *See also United States v. SCRAP*, 412 U.S. 669, 687-88 (1973) ("To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion."); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

many other administrative agency actions." *Akins*, 101 F.3d at 738.

Petitioner does take issue with the conclusion of the court of appeals that Respondents' injury likely will be redressed, but again the argument stretches redressability to (and beyond) its breaking point. Petitioner's contention that it is "far from clear that respondents would ultimately acquire the information they seek" given the discretion of the FEC not to institute an enforcement action, the possible alternative defenses of AIPAC, and the possibility that relief might not include disclosure,[6] Petitioner's Br. at 29-30, proves too much. As the court of appeals stated, Petitioner's argument amounts to "a breathtaking attack on the legitimacy of virtually all judicial review of agency action." *Akins*, 101 F.3d at 738. The same arguments Petitioner makes here can be made regarding judicial review of almost all agency action.[7] *See* Petitioner's Br. at 30 (conceding that these issues

[6] In addition to the other problems with Petitioner's argument identified in text, the various possible scenarios to which Petitioner points are themselves quite speculative. Respondents are not required to establish with certitude that their injury will be redressed, only "that the injury will *likely* be redressed by a favorable decision." *Bennett*, 117 S. Ct. at 1161 (emphasis added).

[7] Petitioner goes on to argue that the specific circumstances of this case and likely legal arguments in an enforcement action against AIPAC make the likelihood that an order from the court will redress the injury particularly speculative. This Court should decline Petitioner's invitation to adopt an approach that will have courts passing judgment on legal issues not otherwise before them and not otherwise in dispute, including apparently arguments that would be raised, if at all, in the future by persons not even parties to the suit. The use of judicial resources required by the Petitioner's suggested approach would be quite considerable. It also would be a peculiar result indeed for the Constitution, in the name of limiting courts to cases or controversies, to require courts routinely to

"will be present to some degree in most suits brought under Section 437g(a)(8)(A)").[8]

3. Prudential Concerns Do Not Limit the Standing of Voters Under Section 437g(a)(8)(A) of the FECA

Petitioner does not contest that voters are within the zone of interests covered by the FECA, undoubtedly for the sound reason that a voter's interest in obtaining information to evaluate candidates is at the core of the interests intended to be advanced by the FECA's disclosure provisions. *See Buckley*, 424 U.S. at 66 ("[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office.") (*quoting* H.R. Rep. No. 92-564, at 4 (1971)); *see also Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

Instead, Petitioner argues that this Court should give Section 437g(a)(8)(A) a cramped construction in order to eliminate standing for voters. *See* Petitioner's Br. at 23, 29. The language of Section 437g(a)(8)(A) is, however, plain and unambiguous. Section 437g(a)(1) permits "[a]ny person" to

evaluate legal issues on which the parties are not now, and may never be, squarely joined.

[8] In any event, Respondents would have standing in this case even if they could not satisfy the "redressability" prong because they have suffered injury to a procedural right. Sections 437g(a)(1), (a)(8)(A), and (a)(8)(C) create a procedural right intended to assist voters and others in protecting (among other things) their concrete interests in the disclosure of information useful to them in the electoral process. "[A] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7.

file a complaint with the FEC, and Section 437g(a)(8)(A) provides that:

> *Any party aggrieved* by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. § 437g(a)(8)(A) (emphasis added). There is no warrant for this Court to ignore that plain language, which unambiguously extends the benefit of the provision to "any party aggrieved." Section 437g(a)(8)(A) represents the clear intention of Congress to rebut the presumption against judicial review of an agency's failure to take action on which Petitioner's argument relies; the very purpose of the Section is, among other things, to subject the FEC to review in situations when it has not taken action. *See, e.g., Democratic Congressional Campaign Comm. v. Federal Election Comm'n*, 831 F.2d 1131, 1133-34 (D.C. Cir. 1987).

Accordingly, Petitioner is left with the unsupportable proposition that the use of the narrower language "any party aggrieved" in the FECA, as contrasted to the "adversely affected or aggrieved" language of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, somehow reflects a congressional intent to exclude from the FECA's judicial review provision voters seeking campaign-finance information. But Congress' decision to use the word "aggrieved" in the FECA and to omit the words "adversely affected" serves a plainer purpose.[9] It simply reflects the fact

[9] *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 (1987) ("[A]t bottom the reviewability question turns on congressional intent.").

that, unlike the APA which extends to a range of agency actions, including rulemakings, and does not limit review to persons who brought proceedings before the agency, Section 437g(a)(8)(A) covers a very narrow class of agency action -- dismissal of or failure timely to address a complaint -- and is limited to a narrow class of potential litigants -- persons who filed the complaint in question with the FEC.[10]

Moreover, it stretches reason to conclude that a provision intended by Congress to supplement and aid enforcement of the FECA should be read to exclude the primary beneficiaries of such enforcement actions -- voters -- from obtaining judicial review of complaints they have properly filed with the Commission. Had Congress wanted to exclude voters, it easily could have done so, either by expressly excluding voters from the Section or specifically including only certain categories of persons, such as opposing candidates, their parties, and supporting PACs. Instead, Congress chose the broad terms of Sections 437g(a)(1) and 437g(a)(8)(A), "any person" and "any party aggrieved."[11]

[10] *Cf. Reytblatt v. United States Nuclear Regulatory Comm'n*, 105 F.3d 715, 720 (D.C. Cir. 1997) (interpreting "party aggrieved" under the Hobbs Act to mean a participant in the agency proceeding who meets constitutional and prudential standing considerations, the latter represented by the zone-of-interests test); *Jones v. Board of Governors of the Fed. Reserve Sys.*, 79 F.3d 1168, 1170 (D.C. Cir. 1996) (noting that the D.C. Circuit "has consistently interpreted the phrase 'party aggrieved' to require as a general matter that petitioners be parties to any proceeding before the agency" (internal quotation and citation omitted)).

[11] Moreover, there is no reason to think that Congress generally viewed politicians, political parties, and PACs as better private attorneys general than voters. While politicians, political parties, and PACs may have competing interests that lead them in some cases to seek enforcement, they just as often have a shared interest in keeping the level of disclosure and enforcement limited for all.

B. Respondents Have Standing as Persons Deprived of Information Integral to Their Daily Operations

Apart from the injury Respondents suffered in their capacity as voters, they also suffered an additional type of injury in fact because "their ability to influence and inform policymakers and the public [was] impaired by the lack of information about AIPAC's contributors and expenditures." *Akins v. Federal Election Comm'n*, 66 F.3d 348, 350-51 (D.C. Cir. 1995), *vacated*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*). A line of D.C. Circuit cases, supported by precedent from this Court, has recognized standing where a failure to disclose information or a restriction on the flow of information creates a significant, direct, adverse impact on the daily operations of an organization or person.[12]

This was the basis of the original D.C. Circuit panel determination that Respondents had standing in this case. While not without ambiguity, the *en banc* court in *Akins* appears to have put the informational standing argument to the side, concluding that the primary injury alleged sounded more in voter injury than the informational-injury line of cases. *See Akins*, 101 F.3d at 736. The informational standing doctrine has considerable potential importance to Common Cause since its core organizational objectives and daily operations -- publicizing, monitoring, and analyzing campaign contributions and expenditures -- qualify it under

[12] *See, e.g., Akins*, 101 F.3d at 735; *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990); *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986), *vacated on other grounds*, 494 U.S. 1001 (1990); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("If, as broadly alleged, petitioner's steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact.").

the D.C. Circuit cases to challenge decisions dismissing complaints it brings at the FEC. While the present case can be decided based on Respondents' standing as voters (as well as the other grounds discussed below), the Court may, in view of the ambiguity below, wish to confirm at least the potential application of informational standing doctrine in these circumstances.

Prudential standing also exists for claims, such as Respondents', under the informational-standing line of cases.[13] Under the zone-of-interests test, the prudential standing inquiry turns on whether the interests at issue are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing*, 397 U.S. at 153.[14] Respondents' interests in informing the public about the sources of campaign contributions and the corresponding influence such contributions could create with candidates, as part of its general efforts to influence and inform the public debate on foreign policy in the Middle East, fall easily within the interests protected by the FECA. As this Court previously has noted, the governmental interests protected by the FECA's disclosure provisions include helping the electorate evaluate candidates -- "sources of a candidate's

[13] The causality and redressability prongs of Article III standing are met under informational standing as well, for the reasons discussed above in Part A.2.

[14] *See also Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) ("In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." (citation omitted)).

financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office" -- and helping deter actual or perceived corruption -- "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Buckley*, 424 U.S. at 66-67.[15]

C. Respondents Have Standing as Members of the Public Deprived of Information to Which They Were Entitled Under the FECA

While Congress cannot create standing where a constitutionally sufficient injury does not exist, Congress has the authority to create a legal right that did not previously exist (and a cause of action to protect that right), interference with which constitutes an injury in fact. *See Lujan*, 504 U.S. at 578; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). As with the FOIA and the FACA, Congress intended through the FECA to provide the public (both voting and non-voting) with information about the operation of the governmental process that Congress concluded the public had

[15] Rather than the narrow zone of interests suggested by Petitioner, the FECA has the indicia of a statute in which Congress sought to extend standing to the limits of Article III. To begin with, the language of the FECA is quite broad: Sections 437g(a)(1) and 437g(a)(8)(A) work in conjunction to provide "[a]ny person" a right to file a complaint with the FEC and if that complaint is dismissed or not acted on in a timely manner, to seek judicial review. *See* 2 U.S.C. §§ 437g(a)(1) & 437g(a)(8)(A). The subject matter of the FECA and the purpose of the provisions at issue further support the understanding that Congress intended standing to extend broadly to all citizens. The electoral process and freedom from governmental corruption are "matter[s] in which it is common to think all persons have an interest," and there can be little dispute "that the obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general.'" *Bennett v. Spear*, 117 S. Ct. 1154, 1162 (1997).

a right to know. Congress charged the FEC to collect and make that information publicly available, and any person can obtain that information either at the offices of the FEC or by submitting a written request to the FEC. *See* 2 U.S.C. §§ 438(a)(4)-(7); 11 C.F.R. §§ 5.1-5.6 (1997). Congress also established a review mechanism through which information may be obtained if disclosure is wrongfully withheld.

While the FOIA and the FECA are not identical in all respects, both create a right to information on behalf of a broad class of persons.[16] And this Court's precedents establish that nondisclosure of information required to be disclosed under such a statute is injury sufficient to confer standing under Article III. *See Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449 (1989) ("Our decisions

[16] The distinction drawn by the court of appeals between the FOIA and the FECA, *Akins*, 101 F.3d at 736, is off point. The difference that does exist is two-fold. First, disclosure of the relevant information under the FECA is, in the first instance, mandatory and automatic, whereas under the FOIA a specific request must be made. The fact that Congress found the information at issue under the FECA important enough to require immediate and automatic disclosure certainly does not militate against the importance of the right. Second, the procedure adopted under the FECA requires exhaustion of an administrative process before resort to the courts. The fact that Congress chose a slightly different process by which a person may seek to obtain information that wrongfully has not been disclosed, however, does not alter the fundamental similarity between the FOIA and the FECA.

Similarly, Petitioner's attempt to create a dispositive distinction between the FOIA and the FECA is unavailing. The fact that the FOIA proceeding is to compel the government to disclose information already in its possession, whereas the FECA requires the government to enforce disclosure obligations applicable to a third party, is a difference that does not affect whether there is injury in fact, but only causation and redressability concerns. For the reasons stated above in Part A.2., and in the opinion of the court of appeals, *Akins*, 101 F.3d at 738-39, causation and redressability are easily met.

interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."); *Havens Realty* 455 U.S. at 373-74.[17]

D. Respondents Have Standing as Individuals Denied Procedural Rights Created by the FECA

Under this Court's decision in *Lujan*, 504 U.S. at 576-78, Congress may not create standing for judicial enforcement of an abstract right in all citizens to have the Executive act in conformity with the law. It is, however, within Congress' power to create a right to information about campaign contributions and expenditures; to establish an administrative process to provide individuals redress for violations of that right; to define procedures and substantive standards to be followed in that administrative process; and to provide for judicial review of that process.

Here, as an aid to statutory enforcement, Congress included in the FECA a provision that permits any person to bring an administrative complaint regarding a violation of the FECA. *See* 2 U.S.C. § 437g(a)(1). The FECA also creates a procedural right for the benefit of persons who properly file such complaints -- that the FEC will address the complaint in a timely fashion and will not dismiss it on grounds that are arbitrary or capricious or otherwise contrary to law. *See* 2 U.S.C. §§ 437g(a)(8)(A) & (C). When the FEC fails to address a complaint in a timely manner or does so in a manner that is contrary to law, it deprives the particular complainant of a right to have his or her complaint treated in accordance with the procedures and standards established by the FECA. This is not a generalized grievance or merely a

[17] Causality and redressability are met as discussed above in Part A.2, and any prudential standing requirements are met as discussed in Part B.

general public interest that has been violated. Rather, it is a personal and concrete injury to the particular claimant's right to receive the treatment guaranteed to his or her complaint under the Act.[18]

The procedural right at issue here is in marked contrast to the citizen-suit brought by the plaintiffs in *Lujan*, who sought to force the government to follow certain procedures requiring consultation among governmental agencies under the Endangered Species Act. The plaintiffs had no personal participation in the procedures at issue. In contrast, the FECA creates rights for particular persons who file administrative complaints and imposes express duties on the government that are for the benefit of, and personal to, those complainants. When the FEC dismisses or fails to address a complaint in a manner that is arbitrary or capricious or otherwise contrary to law, the injury to the complainant is not a generalized grievance, but a specific, concrete injury to that individual. As such, it is an injury sufficient to establish standing for judicial review of the FEC's dismissal of or inaction on the complaint.[19]

[18] The complainant, moreover, often also will have relied to his or her detriment on that statutorily created right. In particular, the FECA imposes burdens on a complainant: the complaint must be in writing, signed, sworn, and notarized, and it is submitted under penalties of perjury and subject to the criminal provisions of 18 U.S.C. § 1001 (false statements). *See* 2 U.S.C. § 437g(a)(1).

[19] Causality and redressability are clearly met. Respondents' deprivation of the right to have their complaint handled by the FEC in accordance with the procedures and standards established by the FECA is directly caused by the FEC's alleged failure to adhere to those procedures and standards originally and is directly redressable by the FEC adhering to them on remand. Zone-of-interests considerations are met as well: The procedural rights allegedly violated were established for the benefit of complainants such as Respondents.

CONCLUSION

For the foregoing reasons this Court should affirm on the issue of standing.

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